

United States
Circuit Court of Appeals

For the Ninth Circuit.

SIMPLEX WRAPPING MACHINE CO.,
a Corporation,

Appellant,

vs.

CHARLES F. SCHULTZ, IRA E. SCHULTZ,
SCHULTZ FOOD COMPANY, a Partnership,
and GEORGE KOSTER, doing business under
the fictitious name and style of KOSTER
CANDY COMPANY,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 316

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Northern

District of California, Southern Division

RENE J. GAUBERT,

Plaintiff,

vs.

CHARLES F. SCHULTZ, an individual, IRA E.
SCHULTZ, an individual, SCHULTZ FOOD
COMPANY, a partnership, and GEORGE
KOSTER, doing business under the fictitious
name and style of KOSTER CANDY COM-
PANY,

Defendants.

BILL OF COMPLAINT [1*]

Comes now the plaintiff, above named, and for
cause of action alleges:

*Page numbering appearing at foot of page of original certified
Transcript of Record.

1. That the plaintiff, Rene J. Gaubert, is a resident of the city of Oakland, State of California, and maintains a place of business in Oakland, California, under the fictitious name and style of Simplex Wrapping Machine Company.

2. That the defendant, Charles F. Schultz, is an individual residing within the northern district of California, southern Division, in which district said defendant has committed the acts of infringement hereafter referred to.

3. That the defendant, Ira E. Schultz, is an individual residing within the northern district of California, southern division, in which district said defendant has committed the acts of infringement hereafter referred to.

4. That the defendant, Schultz Food Company, is a partnership composed of defendant, Charles F. Schultz, and defendant Ira E. Schultz, and that said partnership has a regular and established place of business at Oakland, California, within the northern district of California, southern division, in which district said defendant has committed the acts of infringement hereinafter referred to.

5. That the defendant, George Koster, is an individual doing business under the fictitious name and style of Koster Candy Company, and has a place of business at Oakland, California, within the northern district of California, southern division, in which district said defendant has committed the acts of infringement hereafter referred to.

6. That this complaint constitutes a civil action for infringement of United States Letters Patent No. 2,094,594, and that the jurisdiction of this Court hereof depends upon the Patent Laws of the United States.

7. That on October 5, 1937, United States Letters [2] patent No. 2,094,594 was duly and legally issued to the plaintiff for an invention in a "Bag Making Machine and Method", and that since that date plaintiff has been, and still is, the owner of those Letters Patent.

8. That defendant, Charles F. Schultz, has, within the last six years, infringed and still is infringing those Letters Patent by making, using and selling, or causing to be made, used and sold, bag making machines embodying the patented inventions, and will continue to do so unless enjoined by this Court.

9. That defendant, Ira E. Schultz, has, within the last six years, infringed and still is infringing those Letters Patent by making, using and selling, or causing to be made, used and sold, bag making machines embodying the patented inventions, and will continue to do so unless enjoined by this Court.

10. That defendant, Schultz Food Company, has, within the last six years, infringed and still is infringing those Letters Patent by making, using and selling, or causing to be made, used and sold, bag making machines embodying the patented inventions, and will continue to do so unless enjoined by this Court.

11. That defendant, George Koster, has, within

the last six years, infringed and still is infringing those Letters Patent by using bag making machines embodying the patented inventions, and will continue to do so unless enjoined by this Court.

12. That plaintiff has placed the required statutory notice on all bag making machines manufactured, used and sold by him under said Letters Patent, and has given written notice to said defendant, Schultz Food Company, of its said infringement.

13. That the said invention of said Letters Patent was and is of great utility and value to the plaintiff and of great [3] benefit to the public; and that plaintiff, doing business under the fictitious name and style of Simplex Wrapping Machine Company, has extensively sold and introduced into public use devices in which said patented inventions are embodied, and the public has demanded and has purchased from plaintiff said patented device in large quantities, and, except for the infringements herein complained of, the public has in general acknowledged the validity of the aforesaid Letters Patent, and has respected the plaintiff's rights therein.

14. That defendants, and each of them, have derived unlawful gains and profits from the infringement of said Letters Patent, which plaintiff would have received but for such infringement, and therefore plaintiff has been caused irreparable damage in an indeterminate amount, which can only be determined by an accounting, and for which plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays:

(a) For a permanent injunction restraining the defendants, and each of them, their partners, officers, agents and employees, from the manufacture, use or sale of said patented inventions or Letters Patent aforesaid, or any part thereof, in violation of the rights of the plaintiff, and from otherwise infringing in any manner, directly or indirectly, upon said Letters Patent.

(b) For a decree that defendants account for and pay over to the plaintiff the profits had by defendants and each of them and the damages which have been suffered by plaintiff by reason of said infringement.

(c) For a decree directing the defendants to pay the Court costs, charges and disbursements herein.

(d) For such other and further relief as the circumstances of the case may require. [4]

(e) That defendants be required to answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived.

RENE J. GAUBERT

By PAUL D. FLEHR

JOHN F. SWAIN

His Attorneys

[Endorsed]: Filed Mar. 21, 1940. [5]

[Title of District Court and Cause.]

ANSWER

Now comes the defendants in the above-entitled action, and answer the Bill of Complaint as follows:

1. Defendants have no knowledge of the allegations contained in Paragraph 1 of the Complaint, and therefore deny that the Plaintiff is a resident of the City of Oakland, and maintains a place of business in Oakland, under the fictitious name and style of Simplex Wrapping Machine Company.

2. Defendants admit that Charles F. Schultz is an individual residing within the Northern District of California, Southern Division; but deny that said defendant has committed acts of infringement within said District.

3. Defendants admit that Ira E. Schultz is an individual residing within the Northern District of California, Southern Division, but deny that said Defendant has committed any acts of infringement within said District.

4. Defendants admit that Schultz Food Company is a partnership composed of Charles F. Schultz and Ira E. Schultz, and that said partnership has a regular and established place of business at Oakland, California, within the Northern District of California, Southern Division; but deny that said Defendants have committed any acts of infringement within said District.

5. Defendants admit that George Koster is an individual doing business under the fictitious name

and style of Koster Candy Company, and has a place of business at Oakland, California, within the Northern District of California, Southern Division; but deny that said Defendant has committed any acts [6] of infringement within said District.

6. Defendants admit that this Complaint constitutes a Civil Action for infringement of United States Letter Patent No. 2,094,594, and that the jurisdiction of this Court depends upon the Patent Laws of the United States.

7. Defendants admit that on October 5th, 1937, United States Letters Patent No. 2,094,594, was issued to the Plaintiff on a Bag Making Machine and Method; but deny that the same was issued duly and legally. As to the allegation that the plaintiff has been and still is the owner of said Patent, the Defendants are without knowledge, and therefore deny that the Plaintiff has been and still is the owner thereof.

8. Defendants deny each and every allegation contained in Paragraphs 8 to 11, inclusive, of said complaint.

9. Defendants have no information whether Plaintiff has placed the required statutory notice on all Bag Making Machines manufactured, used and sold by him under said Letters Patent; but admits that he has given written notice to Defendant, Schultz Food Company, of the alleged infringement.

10. Defendants have no information sufficient to form a belief as to the truth of the allegations con-

tained in Paragraph 13 of the Complaint, and therefore deny the same.

11. Defendants deny the allegations contained in Paragraph 14 of the Complaint.

12. Defendants alleged by way of affirmative defense, as follows:

A. The Complaint fails to state a claim against Defendants upon which relief can be granted.

B. That said Letters Patent are invalid and void for the reason that the subject-matter thereof does not amount to invention, but instead amounts to mere mechanical skill. [7]

C. The said Letters Patent are invalid and void for the reason that the claims thereof are not for good and valid patentable combinations, but instead, are for mere unpatentable aggregations.

D. The said Letters Patent, upon information and belief, are invalid and void for the reason that the subject-matter thereof has been constructively abandoned by the Plaintiff in that the Plaintiff sold and publicly used devices embodying the alleged invention thereof more than two years prior to the filing of the application for said letters patent.

E. The said letters patent are invalid and void for the reason that devices embodying the alleged invention were on sale and in public use in the United States prior to the Plaintiff's alleged invention thereof, or more than two years prior to the filing of the Plaintiff's application for letters patent thereon; that Defendants are not now advised of

the names and addresses of such prior users and of the places of sale, but are making diligent inquiries and pray leave to insert the same herein by amendment, when ascertained.

F. The said letters patent are invalid and void for the reason that the alleged invention disclosed therein was known and used by others within the United States prior to the date of the said invention.

G. That said letters are invalid and void for the reason that each and every material part thereof was patented or described in the following patents and publications;

Patent No.	Patentee	Date
135,275	Hotchkiss	Jan. 28, 1873
251,402	Beyer	Dec. 27, 1881
515,121	Hunt	Feb. 20, 1894
		[8]
1,020,821	Hesser	Mar. 19, 1912
1,368,633	Johnson	Feb. 15, 1921
1,703,723	Corse	Feb. 26, 1929
1,780,142	Becker	Oct. 28, 1930
1,953,122	Munson	Apr. 3, 1934
1,973,406	Cooley	Sept. 11, 1934

and others, the numbers and dates of which are now unknown to the Defendants and for which the Defendants are conducting a diligent search and pray leave to insert herein by amendment, when ascertained.

Wherefore, the Defendants pray that the Bill of Complaint herein be dismissed and that they be awarded their taxable costs.

A. SCHAPP,

Attorney for Defendants.

Dated: May 1st, 1940.

Receipt of a Copy of the above Answer is hereby acknowledged, this day of May, 1940.

PAUL D. FLEHR,

Attorney for Plaintiff.

[Endorsed]: Filed May 1, 1940. [9]

[Title of District Court and Cause.]

INTERROGATORIES. [10]

Comes now the Plaintiff and files the Interrogatories herein, which are herewith exhibited to the Court, said Interrogatories to be answered by the Defendants in accordance with the provisions of Rule 33 of the Rules of Civil Procedure.

1. With reference to the allegations contained in Paragraph 12, Section D, of Defendants' Answer:

(a) When and where did Plaintiff sell and publicly use devices embodying the alleged invention of the patent in suit more than two years prior to the filing of his application for said Letters Patent?

(b) Furnish Plaintiff with a photograph, drawing, or other identification of the device or devices referred to in Section (a) hereof.

2. With respect to the allegations set forth in Paragraph 12, Section E of Defendants' Answer:

(a) When and where have each of the devices embodying the invention of the patent in suit been on sale or in public use in the United States prior to Plaintiff's invention thereof?

(b) When and where have each of the devices referred to in Section (a) hereof been on sale or in public use in the United States more than two years prior to the filing of Plaintiff's application for Letters Patent thereon?

(c) Supply Plaintiff with photographs, drawings, or other identifications of each of the devices referred to by Defendants in answering this interrog- [11] atory.

(d) What is the earliest date which at the time of trial, Defendants will establish in connection with each of the devices specified by Defendants in answering sections (a), (b) and (c) of this interrogatory 2?

3. With reference to the allegations contained in Defendants' Answer, Paragraph 12, Section F:

(a) When, where and by whom has the invention of the Letters Patent in suit been known and used by others within the United States prior to the date of Plaintiff's invention?

(b) What is the earliest date or dates which Defendants will establish at the time of trial,

with respect to each of the instances which may be referred to by Defendants in answering this interrogatory?

4. With respect to the allegations set forth in Paragraph 12, Section G, of Defendants' Answer, what parts of Defendants' invention are found in each of the Letters Patent set forth in said Paragraph 12, Section G?

5. Did the Defendant Schultz Food Company publish and cause to be distributed folders as shown in Exhibit 1 attached hereto?*

6. If the answer to interrogatory 5 is in the affirmative, state the names and addresses of purchasers of the machines disclosed in said circular, and the names and addresses of persons using said machines. [12]

7. With respect to Paragraph 12, Section G, of Defendants' Answer, state whether or not Defendants will contend at the time of trial that any of said patents are to be accorded effective dates prior to the filing dates of their respective applications, and if the answer is in the affirmative, specify such earlier effective dates.

8. State whether or not Defendants, Charles P. Schultz, Ira E. Schultz, and/or Schultz Food Company

(a) have continued to manufacture and sell devices of the type illustrated in the attached Exhibit 1, since the commencement of this suit,

*[Printer's Note]: Omitted herefrom inasmuch as said Exhibit is identical to Exhibit 16 reproduced in Book of Exhibits.

(b) are engaged in the design of a new machine for the purpose of avoiding use of certain features embodied in the machine shown in Exhibit 1.

PAUL D. FLEHR,

Attorney for Plaintiff.

Dated: May 28, 1940.

Receipt of a copy of the above Plaintiff's Interrogatories is hereby acknowledged this 28th day of May, 1940.

A. SCHAPP,

Attorney for Defendants.

[Endorsed]: Filed May 28, 1940. [13]

[Title of District Court and Cause.]

INTERROGATORIES [15]

Now Come the Defendants in the above-entitled application, and serve upon the Plaintiff the following interrogatories to be answered under Rule 33:

1. What date will the Plaintiff rely on at the trial, as the date of the conception of the invention?
2. When did the Plaintiff make the first drawing of the said invention?
3. When did the Plaintiff make the first written description of the invention?
4. When did the Plaintiff first disclose the invention to others?

5. Give the date or dates of the first act or acts, other than those specified under Questions 2-4, inclusive, which, if proven, would establish conception of the invention, and a brief description of such act, or acts.

6. When did the Plaintiff reduce the invention to practice?

7. When did the Plaintiff begin to exercise reasonable diligence in adapting and perfecting the invention?

8. Give the filing date or dates of any foreign applications filed on the same subject-matter as that embodied in the patent in issue.

9. Give the date when the first machine embodying features covered by any of the claims relied on in the present suit was used publicly. [16]

10. Give the date when the first machine embodying features covered by any claims relied on in the present suit was placed on sale.

11. What claims of the patent in issue will the Plaintiff rely on at the trial as being infringed by the Defendants?

12. Give the names and addresses of the first three purchasers of Plaintiff's machine embodying the subject-matter of the patent in issue.

13. Furnish a photostatic copy or other reproduction of the first drawing, if any, made by the Plaintiff of the machine embodying the features of the patent in issue.

14. Give the names and addresses of the parties

to whom the Plaintiff disclosed the invention prior to the filing of the patent application.

15. Furnish a photostatic copy or other reproduction of the first written description made by the Plaintiff or some one on his behalf of a machine embodying the features of the invention.

16. State, whether or not, in the conception and/or the reduction to practice of the said invention, the Plaintiff had the aid and cooperation of any other person or persons.

17. If the Question under 16 is answered in the affirmative, give the name and address of such person or persons.

18. State whether or not, prior to the date of the first disclosure of his invention to others, the Plaintiff was familiar with any automatic or semi-automatic bag-making machine or machines. [17]

19. If Question 18 is answered in the affirmative, identify the machine or machines by name of manufacturer or patentee.

20. State whether or not, prior to the date of the first disclosure of his invention to others, the Plaintiff was familiar with any machine for forming bags from sheet material which employed a mandrel and means for folding over side and bottom margins of the sheet over the mandrel through angles of substantially 180 degrees so as to form a T-shaped overlap area on one face of the mandrel.

21. If Question 20 is answered in the affirmative, identify the machine by the name and address

of the manufacturer, or if patented or described in a printed publication, by giving the Number of the patent or the date and title of the publication.

22. State whether or not, prior to the date of the first disclosure of his invention to others, the Plaintiff was familiar with any machine for forming bags from sheet material which employed a T-shaped heated surface.

23. If Question 22 is answered in the affirmative, identify the machine by the name and address of the manufacturer, or if patented, or described in any printed publication, identify the patent or the printed publication.

24. Of what country is the plaintiff a citizen?

25. Of what country was the plaintiff a citizen when he executed the oath accompanying his application for the patent in issue? [18]

A. SCHAPP (sic)

Attorney for Defendants.

Dated: May 18th, 1940.

Receipt of a copy of the above Defendants' Interrogatories is hereby acknowledged this 18 day of May, 1940.

PAUL D. FLEHR,

Attorney for Plaintiff.

[Endorsed]: Filed June 7, 1941. [19]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES. [20]

Now Come the Defendants in the above-entitled action and hereby answer the interrogatories propounded by the Plaintiff in accordance with Rule 33 of the Rules of Civil Procedure, as follows:

Answer to interrogatory 1:

The facts are peculiarly within the knowledge of the plaintiff, and plaintiff, thus far, has refused to answer an interrogatory referring to the first date of public use. Defendants are making diligent inquiry as to the first dates of public use and sale, but have no definite knowledge at the present time.

Answer to Interrogatory 2:

Defendants have no definite knowledge, as yet, which would enable them to answer this question.

Answer to Interrogatory 3:

Defendants have no definite knowledge, as yet, which would enable them to answer this question.

Answer to Interrogatory 4:

This question may be readily answered by Plaintiff by analyzing the patents referred to. Particular attention is called to the patent to Beyer, No. 251,402, which shows a mandrel and means for folding over side and bottom margins of the sheet over the mandrel through angles of substantially 180°, thereby forming a T-shaped overlap area on one side face of the mandrel, and to Hunt, No. 515,121, which shows a T-shaped heated surface.

Answer to Interrogatory 5:

Yes. [21]

Answer to Interrogatory 6:

The names and addresses of purchasers and users of the machine are:

Koster Candy Company, Oakland, California.

Giant Distributing Company, Oakland, California.

Answer to Interrogatory 7:

No, as far as Defendants are advised at the present time.

Answer to Interrogatory 8a:

Yes.

Answer to Interrogatory 8b:

No.

CHARLES F. SCHULTZ (sic).

State of California,

City and County of San Francisco—ss.

Charles F. Schultz, being duly sworn, deposes and says:

I am one of the Defendants above named. I have read the foregoing answers to Plaintiff's Interrogatories and know the contents thereof, and the same are true of my own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, I believe it to be true.

CHARLES F. SCHULTZ (sic).

Subscribed and Sworn to before me this 10th day of June, 1940.

NANCY EVERETT (sic),
Notary Public, in and for the County of San Francisco, and State of California. [22]

Receipt of a copy of Defendant's Answers to Plaintiff's Interrogatories admitted this 11 day of June, 1940.

JOHN F. SWAIN (sic),
Attorney for Plaintiff.

[Endorsed]: Filed June 12, 1940. [23]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO DEFENDANTS'
INTERROGATORIES [24]

Now comes the Plaintiff above named and answers certain interrogatories propounded by Defendants in accordance with Rule 33 of the Rules of Civil Procedure.

Answer to Interrogatory 8.

Plaintiff has no foreign applications or patents on the same subject matter as that embodied in the patent in suit.

Answer to Interrogatory 10.

On or about April, 1935.

Answer to Interrogatory 11.

As now advised, Plaintiff will rely upon claims 14 and 18.

Answer to Interrogatory 12.

Hostess Cake Kitchen

San Francisco, California

Mother's Cake & Cookie Co.

Oakland, California

Grandma Cake Co.

Oakland, California

Answer to Interrogatory 18.

No.

Answer to Interrogatory 19.

See answer to Interrogatory No. 18.

Answer to Interrogatory 20.

No.

Answer to Interrogatory 21.

See Answer to Interrogatory No. 20. [25]

Answer to Interrogatory 22.

No.

Answer to Interrogatory 23.

See answer to Interrogatory No. 22.

Answer to Interrogatory 24.

United States of America.

Answer to Interrogatory 25.

United States of America.

RENE J. GAUBERT.

State of California,
City and County of San Francisco—ss.

Rene J. Gaubert, being duly sworn, deposes and says:

I am the Plaintiff above named. I have read the foregoing answers to Defendants' Interrogatories and know the contents thereof, and the same are true of my own knowledge except as to the matters which are therein stated on information or belief, and as to those matters, I believe it to be true.

RENE J. GAUBERT.

Subscribed and sworn to before me this 3rd day of June, 1940.

(Seal) W. W. HEALEY,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 3, 1940. Receipt of service. [26]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO DEFENDANTS'
INTERROGATORIES.

Now comes the Plaintiff and answers the remaining interrogatories propounded by Defendants: [27]

Answer to Interrogatory 1.

Plaintiff conceived the invention on or about the first of August, 1934.

Answer to Interrogatory 2.

Plaintiff made the first drawing of the invention within one week of the date he conceived the invention.

Answer to Interrogatory 3.

Plaintiff personally made no written description of the invention.

Answer to Interrogatory 4.

Plaintiff disclosed the invention to others on or about the middle of August, 1934.

Answer to Interrogatory 5.

Plaintiff made other drawings of particular features of the machine embodying the invention soon after the first drawings (Interrogatory 2).

Answer to Interrogatory 6.

Plaintiff reduced the invention to practice on or about the first of September, 1934.

Answer to Interrogatory 7.

Plaintiff began to exercise diligence in adapting and perfecting the invention immediately after conceiving it.

Answer to Interrogatory 9.

The first machine embodying features covered by any of the claims relied upon in the present suit was used publicly on or about April 30, 1935.

Answer to Interrogatory 13.

Plaintiff has diligently searched for the first [28] drawing of the machine embodying the features of

the patent in issue but has been unable to locate the same. Plaintiff is continuing his search.

Answer to Interrogatory 14.

Plaintiff disclosed the invention, prior to the filing of the patent application, to:

Don Prenveille, Oakland, California

Ed Weidman of Service Pattern Works, Oakland, California

Roy Collins, Oakland, California

Paul D. Flehr, San Francisco, Calif.

Harvey Sherburne, San Francisco, Calif.

Answer to Interrogatory 15.

The first written description made by anyone under the direction of Plaintiff was the preliminary draft of the specification forming part of the application for Letters Patent which issued into the patent in suit. Plaintiff refers Defendants to a copy of the patent in suit which is substantially the same as the preliminary draft of the specification above referred to. (See Interrogatory 3)

Answer to Interrogatory 16.

Yes.

Answer to Interrogatory 17.

Don Prenveille, Oakland, Calif.

Ed Weidman, Oakland, California

Roy Collins, Oakland, California

RENE J. GAUBERT

State of California,
City and County of San Francisco—ss.

Rene J. Gaubert, being duly sworn, deposes and says: [29]

I am the Plaintiff above named. I have read the foregoing answers to Defendants' Interrogatories and know the contents thereof, and the same are true of my own knowledge except as to the matters which are therein stated on information or belief, and as to those matters, I believe it to be true.

RENE J. GAUBERT

Subscribed and sworn to before me this 27th day of June, 1940.

(Seal)

W. W. HEALEY

Notary Public in and for the City and County of
San Francisco, State of California.

(Acknowledgment of Service)

[Endorsed]: Filed June 27, 1941. [30]

[Title of District Court and Cause.]

STIPULATION [31]

It is hereby stipulated by and between the respective counsel for the parties hereto that the photographs attached hereto Exhibits 2, 3, 4, 5 and 6* are true and accurate photographs of a bag making machine manufactured and/or used and/or sold by the Defendants herein and which is alleged to in-

*[Printer's Note]: Omitted herefrom inasmuch as said Exhibits are identical to Exhibit 17, reproduced in Book of Exhibits.

fringe United States Letters Patent No. 2,094,594 in the Bill of Complaint herein.

PAUL D. FLEHR

Attorney for Plaintiff

September 6, 1940.

A. SCHAPP

Attorney for Defendants

September 6, 1940.

[Endorsed]: Filed Sept. 10, 1940. [32]

[Title of District Court and Cause.]

ORDER [38]

The Plaintiff having moved this Court for an Order under Rule 34 for Discovery and Production of Things for Inspection and Copying, and

The Motion having been heard in open Court on Tuesday, September 10, 1940, both parties being represented by their respective counsel;

It is hereby ordered that the Defendants allow the Plaintiff to have made accurate and complete drawings of the bag making machine disclosed in the photographs, Exhibits 2, 3, 4, 5 and 6 attached to the Stipulation filed September 10, 1940, with the exception however of the following specific features:

1. The mechanism for cutting the end of the bag.

2. The gripping mechanism which delivers the complete bag from the machine.

3. The mechanism for feeding the cellophane from the roll to the machine.

The Plaintiff's Motion for an Order directing the Defendants to produce a bag making machine in Court at the time of trial is denied without prejudice however to Plaintiff's renewing the Motion should Plaintiff deem it necessary at a later date.

MICHAEL J. ROCHE

United States District Judge

Approved:

A. SCHAPP

Counsel for Defendants

Approved:

PAUL D. FLEHR

Counsel for Plaintiff

[Endorsed]: Filed Sept. 10, 1940. [39]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for the respective parties hereto that the "Plaintiff's Motion for Leave to Amend Plaintiff's Answer to Interrogatory 11" may be granted and that the attached "Amended Answer to Defendants' In-

terrogatory No. 11" may be entered and the same shall be considered as a part of "Plaintiff's Answer to Defendants' Interrogatories" filed June 3, 1940.

A. SCHAPP

Attorney for Defendants

October 11, 1940.

PAUL D. FLEHR

Attorney for Plaintiff

October 11, 1940. [40]

[Title of District Court and Cause.]

AMENDED ANSWER TO DEFENDANTS'
INTERROGATORY No. 11 [41]

Pursuant to Order of Court, Plaintiff amends his Answer to Defendants' Interrogatory 11 to read as follows:

As now advised, Plaintiff will rely on claims 2, 3, 5, 8, 11, 14, 18 and 19.

RENE J. GAUBERT

State of California,

City and County of San Francisco—ss.

Rene J. Gaubert, being duly sworn, deposes and says:

I am the Plaintiff above named. I have read the foregoing amended answer to Defendants' Interrogatory 11 and know the contents thereof, and the same is true of my own knowledge except as to the matters which are therein stated on information or

belief, and as to those matters, I believe it to be true.

RENE J. GAUBERT

Subscribed and sworn to before me this 11th day of October, 1940.

(Seal)

W. W. HEALEY

Notary Public in and for the City and County of
San Francisco, State of California

[Endorsed]: Filed Oct. 12, 1940. [42]

[Title of District Court and Cause.]

STIPULATION [43]

It is hereby stipulated by and between counsel for the Plaintiff, and counsel for the Defendants in the above-entitled case, subject to the approval of the Court, as follows:

Pursuant to the Order of the Court, granting the Defendants' Motion to Admit Further Evidence, it is stipulated that a certified copy of the complete File Wrapper in the Application for letters patent of the United States on a Bag-Making Machine, Serial Number 319,486, filed by Charles F. Schultz and Ira E. Schultz on February 17, 1940, together with copies of the patents cited by the Patent Office against the said application, may be filed by the Defendants in this Court as soon as it is received from the United States Patent Office;

That in the meantime, the Defendants will fur-

nish their office copies to the Plaintiff during such times as Plaintiff's counsel may be engaged in the preparation of his final reply brief, hereinafter referred to.

It is further stipulated that the Defendants shall have to and including the 20th day of December, 1940, to file their brief in reply to Plaintiff's brief on file herein, and that the Plaintiff shall have ten days thereafter, within which to file a final reply brief respecting points raised by the filing of the file wrapper in Defendants' Application.

Plaintiff reserves any and all rights and objections he may have with respect to the admission in evidence of the said file wrapper. [44]

Dated: December 9, '40.

A. SCHAPP

Attorney for Defendants

Dated: Dec. 9, 1940.

JOHN F. SWAIN

Attorney for Plaintiff

The foregoing Stipulation is approved, and it is so ordered.

MICHAEL J. ROCHE

Judge

[Endorsed]: Filed Dec. 10, 1940. [45]

[Title of District Court and Cause.]

MEMORANDUM

Roche, District Judge:

This cause having been heretofore tried and submitted to the Court for consideration and decision, the Court, after due consideration finds that the claims at issue, set forth in the invention of Plaintiff, are invalid by reason of anticipation in earlier devices. It is therefore ordered that judgment be entered for defendant, upon preparation of findings of fact and conclusions of law. Each side will meet its own costs.

Dated January 31, 1941.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Jan. 31, 1941. [46]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried in the 6th, 7th and 8th days of November, 1940, after due consideration, the Court enters the following findings of fact and Conclusions of Law, pursuant to Rule 52 of the Rules of Civil Procedure:

Findings of Fact

1. The Plaintiff, Rene J. Gaubert, is a resident of the City of Oakland, State of California, and maintains a place of business in Oakland, Cali-

fornia, under the fictitious name and style of Simplex Wrapping Machine Company.

2. The Defendants, Charles F. Schultz and Ira E. Schultz are individuals residing within the Northern District of California, Southern Division.

3. The Defendant, Schultz Food Company, was, prior to the commencement of this action, a partnership composed of Defendants, Charles F. Schultz and Ira E. Schultz, and had a regular and established place of business at Oakland, California, within the Northern District of California, Southern Division.

4. The Defendant, George Koster is an individual doing business under the fictitious name and style of Koster Candy Company, and has a place of business at Oakland, California, within the Northern District of California, Southern Division.

5. This cause is a civil action for infringement of United States letters patent, No. 2,094,594, and the jurisdiction of this Court depends upon the Patent Laws of the United States. [47]

6. On October 5th, 1937, United States letters patent, No. 2,094,594 issued to the Plaintiff on a Bag Making Machine and Method, and Plaintiff since that date has been, and now is, the owner of the said letters patent.

7. The Defendants, Charles F. Schultz and Ira E. Schultz, doing business as co-partners under the name of Schultz Food Company, have, within the last six years preceding the commencement of this action, manufactured, used and sold bag making

machines of the type exemplified by Defendants' Exhibit A.

8. The Defendant, George Koster, has, within the last six years preceding the commencement of this action, used a bag making machine of the type exemplified by Defendants' Exhibit A.

9. Plaintiff has placed in issue Claims 2, 3, 5, 8, 14, 18 and 19 of his Patent No. 2,094,594.

10. Plaintiff's patented machine is intended for the manufacture of bags from moisture-proof sheet "Cellophane", which is adapted to be sealed along the seams by the mere application of heat under pressure. It is semi-automatic in character and requires the attendance of an operator who feeds each sheet individually, then depresses a foot-level which sets in motion a cycle of operations for forming the sheet into a bag, and thereupon manually removes the bag.

As defined in Claim 2, which was the principal claim under discussion during the trial, Plaintiff's machine comprises:

1. a frame forming an operating table,
2. a plate-like mandrel movably secured to said table, whereby a sheet of said material can be placed between one side of the mandrel and the table,
3. means for folding the side margins of the sheet over the side edges of the mandrel;
4. means for folding a projecting end margin of the sheet over one end edge of the mandrel,
5. means for applying a heated surface under pressure to overlapping portions of the side mar-

gins and to the end margin along an area where the end margin overlaps the side margins. [48]

Claims 5, 8, 14, 18 and 19 are drawn substantially to the same subject-matter, stressing the points that the margins fold through angles of substantially 180° , that the overlap area formed is T-shaped, and that the heater to be used is also T-shaped, and Claim 3 add the limitation of a retractable fold-line retaining means adapted to be interposed within the end fold.

11. Bag making machines were shown and described, more than two years prior to the filing date of Plaintiff's patent in the following United States Patents:

Patent Number	Patentee	Date
135,275	Hotchkiss	Jan. 28, 1875
251,402	Beyer	Dec. 27, 1881
515,121	Hunt	Feb. 20, 1894
1,020,821	Hesser	Mar. 19, 1912
1,368,633	Johnson	Feb. 15, 1921
1,703,723	Corse	Feb. 26, 1929
1,780,142	Becker	Oct. 28, 1930

12. All the claims in issue are anticipated by the above patents, and fail to define invention in view of the said patents.

13. The Beyer Patent is intended for use in connection with sheet paper; it comprises a frame forming an operating table, a plate-like mandrel movably secured to said table, whereby a sheet of the material may be placed between one side of the mandrel and the table; it further provides means for folding the side margins of the sheet over the side edges of the mandrel, means for fold-

ing a projecting end margin of the sheet over one end margin of the sheet over one end edge of the mandrel; and finally it provides means for applying glue to the edges to be sealed and pressure means for bonding the overlapping edges. The side and end margins are folded through angles of substantially 180°, and the overlapping portions of the margins form a T-shaped sealing area. [49]

The Plaintiff's machine is intended for use in connection with moisture-proof "Cellophane", which has the property of becoming adhesive under heat treatment, and Plaintiff, therefore, substitutes heat sealing for the glue sealing of Beyer. But the art of heat sealing of bags is described in the Patent to Hunt in connection with waxed paper, and again in the Patent to Becker in connection with moisture-proof "Cellophane" of the same type as used in Plaintiff's patent. In view of these prior patents, it did not amount to invention to apply the Hunt and Becker ideas of heat sealing to the Beyer machine.

In folding the margins of his sheet over the mandrel, the Plaintiff arrives at a longitudinal seam and a transverse bottom seam, the two seams being referred to as a T-shaped seam area, lying in a single plane. The same T-shaped seam is found in the Beyer Patent. The Plaintiff provides a "similarly shaped" heater for sealing the entire seam in one operation. There is no inventive concept in providing a T-shaped heater, nor in providing a heater shaped similarly to the surface to be heated, particularly in view of the Patent to Hunt, which

plainly teaches the application of a heater shaped similarly to the surface to be heated.

Claim 3 calls for a retractable fold-line retaining means adapted to be interposed within the end fold. There is no invention broadly in the use of a retractable fold line retaining means where desired.

Conclusions of Law

1. The Court has jurisdiction of the cause of action set out in the Bill of Complaint.

2. The Court has jurisdiction of the parties.

3. The claims 2, 3, 5, 8, 14, 18 and 19 of the Plaintiff's patent are invalid by reason of anticipation. [50]

4. The Plaintiff and the Defendants shall meet their respective costs and assessments herein.

5. The Defendants are entitled to a Decree dismissing the Bill.

MICHAEL J. ROCHE

United States District Judge

Receipt of a copy of the foregoing Revised Findings of Fact and Conclusions of Law, admitted this 6th day of March, 1941.

PAUL D. FLEHR

Attorneys for Plaintiff

[Endorsed]: Filed Mar. 6, 1941. [51]

[Title of District Court and Cause.]

FINAL JUDGMENT

This cause having come on to be heard before this Court, and having been fully tried upon tes-

timony offered in open Court, and the Plaintiff and the Defendants by their respective counsel having thereafter submitted briefs and the cause having been submitted to the Court, and the same having been duly considered

It is hereby ordered, adjudged and decreed:

1.

The Court has jurisdiction of the cause of action set out in the Complaint.

2.

The Court has jurisdiction of the parties.

3.

The Claims 2, 3, 5, 8, 14, 18 and 19, of the Plaintiff's Patent are invalid by reason of anticipation.

4.

The Plaintiff and the Defendants shall meet their respective costs and assessments herein.

5.

The Plaintiff's Bill of Complaint stands dismissed with prejudice.

Dated: This 13th day of March, 1941.

MICHAEL J. ROCHE

United States District Judge

Approved as to form:

PAUL D. FLEHR

Attorney for Plaintiff

[Endorsed]: Filed Mar. 13, 1941. [52]

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION OF
PARTIES PLAINTIFF [53]

Whereas, Rene J. Gaubert is the Plaintiff herein; and

Whereas, Rene J. Gaubert was at all times during the pendency of the above entitled action and until May 17, 1941, the owner of United States Letters Patent No. 2,094,594, the Letters Patent in suit; and

Whereas, on May 17, 1941, said Rene J. Gaubert did sell, assign and convey the entire right, title and interest in and to said United States Letters Patent No. 2,094,594, together with all causes of action for the recovery of damages or profits on account of infringement of the same, to Simplex Wrapping Machine Co., a corporation of the State of California, having a place of business in Oakland, California;

Now, therefore, it is hereby ordered that Simplex Wrapping Machine Co. be substituted for Rene J. Gaubert as Plaintiff.

June 6, 1941.

MICHAEL J. ROCHE

United States District Judge

It is hereby stipulated by counsel for Defendants that said Simplex Wrapping Machine Co. may be substituted for Rene J. Gaubert as Plaintiff.

A. SCHAPP

Attorney for Defendants

[Endorsed]: Filed June 6, 1941. [54]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73B

Notice is hereby given that Simplex Wrapping Machine Co., Plaintiff-Appellant, above named, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit from the final judgment entered in this action on March 14, 1941.

PAUL D. FLEHR

Attorney for Simplex Wrapping
Machine Co. (substituted for Rene
J. Gaubert)

[Endorsed]: Filed June 10, 1941. [55]

The premium charged for this bond is Ten Dollars per annum.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Simplex Wrapping Machine Co., Plaintiff and appellant in the above entitled action, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and entered against it in the United States District Court for the Northern District of California in favor of the Defendant in said action, on the 14 day of March, 1941; and

Whereas, the said appellant is required to give an undertaking for costs on appeal as hereinafter conditioned.

Now, therefore, Fireman's Fund Indemnity Company, of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellant and acknowledges itself bound to the said Defendant in the sum of Two Hundred Fifty and no/100 Dollars (\$250.00) that the said appellant will pay all costs which may be adjudged against it on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and no/100 Dollars (\$250.00).

It is further stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above entitled District Court may, upon notice to the Surety of not less than 10 days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judgment therefor against the said surety and award execution thereof. [56]

Signed, sealed and dated this 9th day of June, 1941.

(Seal) FIREMAN'S FUND INDEMNITY
COMPANY

By F. J. CRISP

Attorney-in-Fact

(Acknowledgment of F. J. Crisp)

[Endorsed]: Filed Jun. 10, 1941. [57]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES ON THE APPEAL

[58]

Now comes the Appellant, and specifies the following points upon which it intends to rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment made and entered by this Honorable Court on the fourteenth day of March, dismissing the Bill of Complaint against the Defendant:

1. The Court erred in dismissing the Bill of Complaint.

2. The Court erred in not granting against said Defendants, and each thereof, the injunction prayed for in the Bill of Complaint.

3. The Court erred in finding or adjudging that claims 2, 3, 5, 8, 14, 18 and 19 of United States Letters Patent No. 2,094,594 were invalid by reason of anticipation.

4. The Court erred in finding or adjudging that claims 2, 3, 5, 8, 14, 18 and 19 of United States Letters Patent No. 2,094,594 fail to define invention in view of the prior art.

5. The Court erred in not finding or adjudging that claims 2, 3, 5, 8, 14, 18 and 19 of United States Letters Patent No. 2,094,594 were valid.

6. The Court erred in finding or adjudging that:

The Beyer Patent is intended for use in connection with sheet paper; it comprises a frame

forming an operating table, a plate-like mandrel movably secured to said table, whereby a sheet of the material may be placed between one side of the mandrel and the table; it further provides means for folding the side margins of the sheet over the side edges of the mandrel, means for folding a projecting end margin of the sheet over one end edge of the mandrel; and finally it provides means for applying glue to the edges to be sealed and pressure means for bonding the overlapping edges. The side and end margins are folded through angles of [59] substantially 180° , and the overlapping portions of the margins form a T-shaped sealing area.

The Plaintiff's machine is intended for use in connection with moisture-proof "Cellophane", which has the property of becoming adhesive under heat treatment, and Plaintiff, therefore, substitutes heat sealing for the glue sealing of Beyer. But the art of heat sealing of bags is described in the patent to Hunt in connection with waxed paper, and again in the Patent to Becker in connection with moisture-proof "Cellophane" of the same type as used in Plaintiff's patent. In view of these prior patents, it did not amount to invention to apply the Hunt and Becker ideas of heat sealing to the Beyer machine.

In folding the margins of his sheet over the mandrel, the Plaintiff arrives at a longitudinal

seam and a transverse bottom seam, the two seams being referred to as a T-shaped seam area, lying in a single plane. The same T-shaped seam is found in the Beyer Patent. The Plaintiff provides a "similarly shaped" heater for sealing the entire seam in one operation. There is no inventive concept in providing a T-shaped heater, nor in providing a heater shaped similarly to the surface to be heated, particularly in view of the Patent to Hunt, which plainly teaches the application of a heater shaped similarly to the surface to be heated.

Claim 3 calls for a retractable fold-line retaining means adapted to be interposed within the end fold. There is no invention broadly in the use of a retractable fold line retaining means where desired. [60]

7. The Court erred in not finding or adjudging that the Defendants and each thereof had infringed United States Letters Patent No. 2,094,594 and claims 2, 3, 5, 8, 14, 18 and 19 thereof.

8. The Court erred in finding or adjudging that the parties should meet their respective costs.

9. The Court erred in not finding or adjudging that the Plaintiff should recover its costs and disbursements herein.

Wherefore, the Plaintiff prays that the decree entered herein on the fourteenth day of March, 1941, be reversed and that a decree be entered in

accordance with the prayers of the Bill of Complaint herein, with costs to Plaintiff.

PAUL D. FLEHR

Attorney for Plaintiff-Appellant

Dated: June 30, 1941.

Receipt of a copy of the above Statement of Points Upon Which Appellant Relies On the Appeal is hereby acknowledged this 30th day of June, 1941.

A. SCHAPP

Attorney for Defendants

[Endorsed]: Filed June 30, 1941. [61]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The Appellant, pursuant to Rule 75 of the Rules of Civil Procedure designates the following portions of the record, proceedings and evidence to be contained in the record on appeal: [64]

1. Bill of Complaint.
2. Answer.
3. Stipulation dated September 6, 1940.
4. Plaintiff's Interrogatories filed May 28, 1940.
5. Defendants' Answers to Interrogatories filed June 11, 1940.

6. Order filed September 10, 1940.
7. Memorandum dated January 31, 1941.
8. Findings of Fact and Conclusions of Law (as approved by Court).
9. Final Judgment.
10. Order of Substitution of Parties-Plaintiff.
11. Notice of Appeal.
12. Bond on Appeal.
13. Reporter's transcript of the testimony taken on behalf of the Plaintiff and Defendants at the trial of the cause on November 6, 7, and 8, 1940.
14. All of the exhibits introduced in evidence by both parties to the cause.
15. Statement of the points upon which Appellant relies on the Appeal.
16. Order allowing withdrawal of original Reporter's transcript and exhibits.
17. Designation of contents of Record on appeal.

PAUL D. FLEHR

Attorney for Plaintiff-Appellant

Dated: June 30, 1941.

Receipt of a copy of the above Designation of Contents of Record on Appeal is hereby acknowledged this 30th day of June, 1941.

A. SCHAPP

Attorney for Defendants.

[Endorsed]: Filed June 30, 1941. [65]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL CONTENTS
OF RECORD ON APPEAL

The Appellee, pursuant to Rule 75 of the Rules of Civil Procedure, designates the following portions of the record, proceedings and evidence to be contained in the Record on Appeal:

1. Defendants' Interrogatories, dated May 18th, 1940;
2. Plaintiff's Answers to Defendants' Interrogatories of June 3rd, 1940;
3. Plaintiff's Answer to Defendants' Interrogatories of June 27th, 1940; and
4. Stipulation re Filed Wrapper of December 9th, 1940;
5. Amended answer to Defendants' Interrogatory No. 11.

A. SCHAPP

Attorney for Defendants-
Appellee.

Dated: June 9, 1941.

(Acknowledgment of service)

[Endorsed]: Filed July 9, 1941. [66]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 66 pages, numbered from 1 to 66, inclusive, contain a full, true and correct transcript of the records and proceedings in the cause entitled Simplex Wrapping Machine Co., Plaintiff, vs. Charles F. Schultz, an individual, et al, Defendants. No. 21514-R., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Twenty dollars and fifty-five cents (\$20.55) and that the said amount has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 21st day of July, A. D. 1941.

(Seal)

WALTER B. MALING

Clerk

WM. J. CROSBY

Deputy Clerk [67]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

Wednesday, November 6, 1940.

Counsel Appearing:

For Plaintiff:

PAUL D. FLEHR, Esq.,

JOHN J. SWAIN, Esq.,

For Defendants:

A. SCHAPP, Esq.

The Clerk: Gaubert v. Schultz.

Mr. Flehr: Your Honor, this is a patent infringement case. The patent in suit is issued to Rene Gaubert. It is patent No. 2,094,594, granted October 5, 1937, for a bag-making machine and method. I have a copy of the patent here for the Court. (Handing document to the Court.)

Now, the plaintiff in the suit is the same patentee, Mr. Rene Gaubert, and he is doing business as the Simplex Wrapping Machine Company, of Oakland, California. The defendants are Charles F. Schultz and Ira E. Schultz, doing business as co-partners under the name of Schultz Food Company, of Oakland. In addition to those defendants we have the defendants George Koster, doing business as Koster Candy Company, of Oakland. [68]

The two Schultzes, that is, the Schultz Food Company, are charged with the making, using and selling of the infringed machines and the defendant George Koster is charged with the using of the machine.

Now, your Honor will probably recall that cellophane appeared upon the market some years ago, and was immediately introduced into the merchandising field for the wrapping of various packages and various products. Now, the cellophane that was first put upon the market was what was termed a plain cellophane, and later so-called moisture-proof cellophane was placed upon the market. Now, plain cellophane looks like moisture-proof cellophane, but the two have different properties. The plain cellophane is not moisture-proof; that is, the moisture from the atmosphere can pass through it. The moisture-proof cellophane has a very thin coating of moisture-proof material on the surface of it, and that resists the penetration of moisture. Another distinction between plain and moisture-proof cellophane is that if you take two layers of plain cellophane and apply heat there is no tendency for them to stick together, but if you take moisture-proof cellophane and overlap two layers and apply heat and pressure there is a seam, and by that process you can form a bond between the two overlaps.

Now, Mr. Gaubert made his invention in 1934, and at that time the food industry had a very particular problem in packing their products. They wanted a moisture-proof wrapping for things like popcorn, cookies, and so forth, to protect their products. At that time there was available to the food industry what is called a half cellophane bag. I have one here (showing). You notice the back part is of translucent material and the front part

is cellophane. That is what is called a window-faced bag. [69] Now, there were companies making that bag and they were endeavoring to have the food manufacturers use it for the packaging of their products. Now, that bag had its disadvantages. In the first place, it wasn't as moisture-proof as it should have been. If you put cookies or popcorn in bags like that, in damp weather the moisture penetrates through the paper and spoils the products, and so they could not be sold all through the year, the sales were seasonal. Now, the large bag manufacturers also endeavored to sell to the trade what is called "All Cellophane Bag." By that I mean a bag completely of moisture-proof cellophane. At that time the edges of the sheet of material which was folded up to make the bag were glued together. Now, of course, that bag was better than the window type bag, but the difficulty was it was too expensive. This type of bag (indicating) is expensive enough, but it didn't meet the requirements, and as a result the food industry was looking for something to pack their products in moisture-proof containers. Another difficulty in the purchase of these bags was they had to maintain large inventories of different kinds of bags and different sizes of bags for different products. That made the entire matter practically impracticable to them.

Now, Mr. Gaubert found out in 1934 that the industry had this problem. He found out what they really wanted was a machine they could use in their own plants, a very simple machine which didn't cost

so much money, one which they could put into their establishment and put a girl on the machine and manufacture their own bags of moisture-proof cellophane. Certain individuals in the industry told Mr. Gaubert about this thing. He investigated and found out there was a real need for the machine. At that time Mr. Gaubert was familiar with the cellophane industry [70] because he was manufacturing a machine for wrapping pies and cakes with moisture-proof cellophane. That machine was successful, although it had a limited demand. So he set about to see what he could do about supplying the industry with a machine for making their own bags. So shortly he produced a rather crude hand model. I have it over here (indicating), a rather crude device. We will demonstrate it later on in the case, but this is the device that Mr. Gaubert made first to have it shown manually, and he was successful in making bags that the trade wanted, and he showed those bags to the trade, and they were quite pleased with them, they said, "If you can show us a machine we can use to make bags like those we will buy a machine. So he worked extensively on the problem to make the machine into a practical, workable device. So in 1935 he made up a commercial machine, which I have here—he made up this commercial machine—now, this is not the first commercial machine that he made, but this is one he manufactured for several years after making up the first one. He made some changes in it after the first one was put upon the market. As I say,

he made up the first ones in 1935, and the circumstances surrounding the acceptance of that by the trade was remarkable. He delivered the first one to the Hostess Cake Company, and they were quite delighted with the machine. In fact, they had never seen the machine before, the machine was delivered in the morning, and they knew the machine was coming, and they had hired this girl to run the machine, and in the same morning Mr. Gaubert was able to train that girl to operate the machine, and left the plant, and the girl continued to work at that plant for several years making bags on that machine. They bought additional machines and Mr. Gaubert naturally went into the manufacture and sale of these machines. [71] That machine is quite similar to what is shown in the Gaubert patent.

Now, more recently Mr. Gaubert has put out a machine which is more elaborate than this machine, and which I have here (indicating). I won't attempt to go into the ramifications of these machines now, but, briefly, in this machine (indicating) the paper is fed into the machine by hand, that is, the cellophane and the bag, after being completed, the bag is taken out by hand. In this machine the cellophane feeds continuously through the machine automatically, and the bags are discharged from the machine automatically.

The Court: Sealed?

Mr. Flehr: Sealed, yes. The sealing operation, your Honor, is carried on by this, here (indicating)—it seems to be warm—and I might say briefly if

you are interested at this point that in this machine the sheet of cellophane as it comes off this roll it is cut, and then a sheet of cellophane is placed upon this blade, which we call a mandrel, and after it comes off that blade there is a foot pedal which is pressed, and then the machine starts automatically the cycle. There are folding elements which form a longitudinal seam, and there is a folding mechanism which folds over the mandrel, and then there is a T-shaped heating element comes down, and in one operation it folds both the longitudinal and lateral seams, and then the folding elements get out of the way and the heater comes up, and then you can simply take off the finished bag from the mandrel. I have one of the bags made on the Gaubert machine here (producing). This bag happens to be one that is printed, but otherwise it will give you some idea.

Now, these bags made by Mr. Gaubert's machine, as I say, [72] were satisfactory to the industry. They were able to take these bags and put their popcorn, cookies, candies and things of that sort in those bags, and have them so they could resist a damp climate like in San Francisco, and, for example, they could have fresh popcorn in those sacks.

Now, the defendant has put his machine on the market fairly recently——

The Court: Fix the time, if you can.

Mr. Flehr: Pardon me?

The Court: Fix the time, if you can.

Mr. Flehr: I am not positive as to the marketing of the defendants' machine.

Mr. Schapp: When did you put your machine on the market?

Mr. Charles Schultz: About in August, 1937.

The Court: All right. Keep in mind your record of what you expect to prove, so counsel can have an opportunity to answer.

Mr. Flehr: Defendant designed his machine, manufactured his machine with full knowledge of the plaintiff's machine. In fact, the evidence will show defendant purchased two of Mr. Gaubert's machines and used those machines very successfully. Now, at first the defendants were simply manufacturing a food product, and they wanted to buy Mr. Gaubert's machine, and they did buy it, to make up their own bag requirements for the purposes of packaging defendant's food products in bags made upon Mr. Gaubert's machine. Subsequently it seems they decided to go into the bag business, themselves, and subsequent to that it appears they decided to manufacture a machine of their own instead of buying any more machines from Mr. Gaubert, so they did manufacture this machine, and then went into the machine business instead of staying in the food business or the bag business. Now, this is the [73] Schultz machine here, your Honor (indicating). I won't attempt to describe it. It produces a bag which is identical to the bag I gave you there. It has some differences from this machine, which I will point out later. I might say this is a machine

of the full automatic type, in that the paper is fed continuously and the bags are taken out automatically.

Now, the patent in suit—we are relying on claims 2, 3, 5, 8, 11, 14, and 18. Now, those claims, with the exception of Claim 14, are apparatus claims, that is, they are drawn to elements of the machine used in combination in the machine. Claim 14 is a method claim, drawn upon the steps of operation used in folding the cellophane and in effecting the heat seal. Now, as to Claim 11, I want to say frankly that my view on Claim 11 is uncertain, because I have seen several of Mr. Schultz's machines and they differ in so far as the features are concerned to which Claim 11 is applicable, so I may at a later time ask for the withdrawal of that claim, depending upon what evidence is drawn out here.

I think I will show very conclusively, your Honor, that these elements of the claims in suit read directly upon and all those elements are found on the Schultz machine, and all the elements of the Schultz machine are equivalent to the Gaubert patent, or the Gaubert machine we have here.

Now, I think your Honor will appreciate from what I have said and what we will produce upon the trial that this is not a gadget, or a tricky formula, or something nebulous. It is something tangible. This man has done something, he has made a contribution to the art. We are not asking this Court to stretch what is claimed in the patent, and we feel we are simply asking for an interpretation

of this patent which was exactly what [74] the Patent Office intended when this patent was granted.

Mr. Schapp: Now, may I make a statement? [75]

OPENING STATEMENT FOR THE DEFENDANTS

Mr. Schapp: If your Honor please, the patent in issue, as your Honor has been advised, relates to a machine for making bags from sheet cellophane. Bag-making machines have been made for a long time—as a matter of fact, one bag-making machine working on somewhat similar procedure was patented as early as 1873, the same skill——

The Court: Using cellophane?

Mr. Schapp: No, not cellophane, no. The only difference between those old machines and the new machines was that the old machines worked on paper, whereas the new machine works on cellophane, and the difference is principally that paper requires glue for sealing, whereas this cellophane can be heat-sealed by the mere application of heat and pressure.

Now, plaintiff does not claim to be the inventor of cellophane, nor does plaintiff claim that he is the discoverer of the fact that cellophane could be heat-sealed.

Nor was plaintiff really the first one to apply heat treatment to cellophane, because that also had been done before. Particularly, it had been applied a long time ago in connection with wax paper, which also responds to heat treatment in the same manner

as cellophane. In organizing his machine plaintiff follows old and established practices and methods. He uses sheet cellophane—that is, he cuts cellophane or whatever his material is into sheets which conform in size to the shape of the individual bag. Then he produces a flat table in his machine and places the sheet material on the flat table, then he places a mandrel on the center of the sheet, folds over one side, then he folds over the other side, then he folds over the free end over the mandrel so he has a longitudinal seam and a vertical seam [76] which he calls a T-shaped seam. After he has his T-shaped seam then he uses a heater—a heating element, which is the same form as the seam, and which is also T-shaped, so when it comes down on the T-shaped seam it seals it in one single operation.

Now, the T-shaped heater is probably the crux of the present controversy, and forms a part of most of the claims in issue. Originally it was the sole issue, although since then plaintiff has added some claims to it, which brings different issues into the case.

Now, a prototype of this particular machine was invented as early as 1881, and was patented by an inventor by the name of Beyer. The Beyer patent will be produced in evidence. Now, the sole difference between the Beyer patent and the plaintiff's patent is that the Beyer patent works with ordinary paper, whereas the plaintiff's patent uses cellophane—glue treatment on the one hand and heat

treatment on the other hand—but in the particular procedures the patents are exactly the same. That is, he cuts his paper to form one bag and he provides a flat table and he places the individual sheet on the flat table and uses a mandrel by which he folds over one side and folds over the other side and pulls it over the end, so he has a T-shaped seam, and he applies the glue and applies pressure for setting the glue—of course, the pressure must be T-shaped, somewhat, because otherwise it wouldn't press a T-shaped seam, although the pressure area is somewhat large and covers the entire bag.

Now, we claim, in view of the Beyer patent, which shows the same method of making a T-shaped seam and the same method of applying pressure to seal the seam,—the cellophane calling for heat treatment instead of glue,—there is no room for invention to apply the Beyer patent to cellophane. [77] Of course, your Honor, there can be no patent on the T-shape, as plaintiff did not invent the “T”. If anybody could get any patent on the T-shape somebody could get a patent on the Y-shape, and another a patent on the X-shape, and so on through the alphabet. That idea is to preposterous to even be worth arguing.

If there is any invention, it must lie in the idea of applying a heater or heat surface which corresponds to the shape of the seam, so that it will perform the sealing of the seam in a single operation. But this idea, again, is not new, your Honor. This

idea was disclosed as early as 1894—that is some 45 years ago—in the Hunt patent, which will also be introduced in evidence. But at that time they didn't have cellophane, they didn't know about cellophane, but in the Hunt patent wax paper was used, and wax papers respond to heat treatment somewhat in the same manner as cellophane. In this particular patent the inventor proposes to make a square bag instead of a flat bag. To do that he uses a square block and he takes a pre-formed sheet of paper and he winds it around the edges of the square block, then he folds over the projecting ends so as to form a top seam, then he uses a single heater which he applies around both of those portions, around the vertical seam and the lateral seam, in a way that forms a seam, and he performs the sealing in one operation. Of course, this arrangement is at right angles and the heater is arranged to form an L form in a side view, but still if you will look at it in another view it is a T-shaped heater, and it looks exactly like plaintiff's heater. As a matter of fact, it could be used on plaintiff's heater—I mean bodily transferred, with some minor changes.

[78]

Now, we claim again that in view of the Beyer patent, which shows the entire operation of forming the T-shaped seam, and in view of the Hunt patent, which not only discloses heat sealing, but a T-shaped seam, that there cannot be any invention in applying Beyer or Hunt's heater to the Gaubert machine, and both of which were invented sixty and forty years ago.

As far as the question of infringement is concerned, we will show, or we will attempt to show, your Honor, that the machines are radically different. Now, I gather from the machines that are presented here by plaintiff, that plaintiff is trying to convey the idea that all these three machines are the machines in issue. They are not. This machine and that machine (indicating) are later developments. They are not included in the original patent. They are merely introduced for the purpose—probably at least—of showing that the original machine which is actually shown in the patent could be changed partly by following the teachings in the defendant's machine and accomplishing what defendant's machine accomplishes. The principal difference between the two machines—that is, the patented machine and the defendant's machine—is that the patented machine is only semi-automatic——

The Court: Pardon me for an inquiry at this time.

Mr. Schapp: I beg your pardon, your Honor?

The Court: Pardon me for an inquiry at this time. Which one of your machines does your client have?

Mr. Schapp: This is our machine (indicating).

The Court: No, which one of the machines did he first have?

Mr. Schapp: This is the machine he first—(indicating)——

Mr. Flehr: No, Mr. Schapp, this is the machine you had (indicating). This is the one that corre

sponds to the patent, [79] your Honor, the commercial machine, not the crude model over there (indicating).

Mr. Schapp: The patent is only for the arrangement of the feeding——

The Court: I didn't ask what it shows, but I just wanted to know the first machine he had.

Mr. Schapp: Can you point that out?

Mr. Charles Schultz: We had a machine quite similar to this, without the sheeting device (indicating).

The Court: I just wanted to identify it. Proceed.

Mr. Schapp: The patented machine is semi-automatic in operation, that is, it requires the stacking of sheets on the machine, the operator takes one of the sheets, presses the mandrel and performs the sealing operation, and takes off the bag. The machine requires continuous operation. The defendant's machine is fully automatic, the paper feeds from a roll continuously and doesn't require the continuous attendance of the operator. As stated before, Plaintiff's machine works on pre-formed sheets and each claim in the patent contains that limitation "sheet". Now, there may be some dispute as to what "sheet" means, whether it means a pre-formed sheet or whether it means a long sheet coming from a roll. It is a subject of argument, but we contend that the claim—that all of the claims of plaintiff are avoided by the defendant's machine, because all the claims of plaintiff's patent call

for sheet material, which we interpret as material calling for sheets that have been cut.

The Court: Pardon me a minute.

(A brief recess was taken.)

Mr. Schapp: If your Honor please, I understand from a brief conversation with counsel and with my own clients, that [80] neither one of these two machines actually represents what is shown in the patent, and neither one of those two machines is actually the machine that Mr. Schultz had when he developed his own machine. It must have been some sort of intermediate development.

Mr. Flehr: The fact is it corresponds quite closely with what is shown in the patent.

The Court: Well, that can be developed later. I just wanted to follow it generally.

Mr. Schapp: Very well, your Honor.

Now, on the question of infringement, apart from this claim on pre-formed sheets, most of the machines call for a table top upon which to place the paper. Our machine really doesn't need that table top.

The Court: Table top—what do you mean by “table top”?

Mr. Schapp: The table top would be this piece that you would place the sheet of paper on before the mandrel comes down (indicating). In Defendant's machine, which we will demonstrate later, that isn't placed on the table top, it doesn't need a table, unless by some stretch of the imagination you can call this a table (indicating), but as I say,

the table top is not an essential element of the machine, and your Honor will probably be unable to discover a table top in the defendant's machine. Plaintiff's claims—most of his claims, at least, also call for a movable mandrel. Now, mandrels, of course, have been used for paper bag machines ever since they started. We use a mandrel in our machine, but our mandrel is absolutely fixed, our mandrel is not moved and should be really absolutely fixed. As far as the T-shaped seam is concerned, of course we use the T-shaped seam as shown in prior patents, but one of the [81] claims, which seems to be one of the most important claims relied on by plaintiff, tries to protect the idea of the T-shaped seam plus the T-shaped heater, the very simple idea of those two elements put together. Now, while we use the T-shaped seam we claim we don't use a T-shaped heater, and though we use a heater that looks somewhat like a T, it really isn't if you go down to the final analysis of the device. The T-shaped heater used by the plaintiff is used to cover the seam, so his T in the heater looks like the T in the seam, covers the entire seam. The defendant doesn't use such a heater. They use two heating members that are spaced from one another, they are spaced from one another, and they couldn't perform the sealing in a single operation. As a matter of fact, defendant's device requires two operations to perform the actual sealing job,—though we have a single cycle there are two operations. And the two heaters are not interchange-

able. The plaintiff could not use the defendant's heater on his device, for certain structural reasons, neither could the defendants use the plaintiff's heater and make a good bag, because it would leave a portion of the bag unsealed. Furthermore, there is a slight difference in so far as the plaintiff's bag after it comes out of the machine, it leaves a slight imperfection which the defendants have overcome, and their bag comes out of the machine as a somewhat improved bag.

Now, we claim, to repeat, in the first place, since the plaintiff's patent is a Chinese copy of the Beyer patent, since the heater has been borrowed from the Hunt patent, and since the two machines are radically different in their entire operation, we claim that plaintiff cannot possibly call for a construction of their patent which would bring the defendant's machine within [82] the scope of the claims in issue.

Mr. Flehr: Mr. Gaubert.

RENE GAUBERT,

called as a witness on behalf of Plaintiff; sworn.

The Clerk: Q. Will you state your name to the Court?

A. Rene Gaubert.

Mr. Schapp: Will your Honor permit me to sit in the jury box? My hearing is not so very good.

The Court: All right.

(Testimony of Rene Gaubert.)

Direct Examination

Mr. Flehr: Q. Mr. Gaubert, you are the inventor of the patent in suit? A. Yes, sir.

Q. And do you still own that patent?

A. Yes, sir.

The Court: Speak up so the Reporter can hear you.

Mr. Flehr: I offer in evidence at this time a copy of patent in suit, No. 2,094,594.

The Court: It will be admitted and marked.

Mr. Flehr: To be marked Plaintiff's Exhibit 1. (The patent was marked "Plaintiff's Exhibit 1.")

Mr. Flehr: Q. You do business under the name of Simplex Wrapping Machine Company?

A. Yes, sir.

Q. Your machines are known by that trade name, are they? A. Yes.

Q. Now, Mr. Gaubert, would you briefly outline your mechanical experience, please?

A. When I was fifteen years old I took the job of apprentice machinist, I went to work at the Union Gas Company in Oakland as an apprentice. Then I worked in the shops of the Caterpillar Tractor Company, and then in 1920 I went to [83] work at Johnson Gear Company, as toolmaker, and in the experimental department, Johnson Gear Company of Berkeley, California. I worked there ten years, until 1930.

Q. What is the nature of your training along the lines of engineering mechanics, apart from your actual shop experience?

(Testimony of Rene Gaubert.)

A. Due to the fact I was very interested at that time in the work I was doing, I took up mechanical drawing and engineering and I worked at night. In fact, I worked under the supervision of my uncle, who is an engineer.

Q. Can you give me the approximate date when you made the invention of the patent in suit, Mr. Gaubert? A. 1934.

Q. What was your occupation at that time?

A. I was working in building wrapping machines that would handle cellophane, pie wrapping machines and cake wrapping machines.

Q. Was that your own business that you were operating at that time? A. Yes.

Q. And the business that you went into after leaving the Johnson Gear Company?

A. That was the business I went to.

Q. Now, did that business bring you into contact with the food industry?

A. It certainly did. I was selling these machines in the food industry and I traveled all over the country in selling my machine. I came in contact with large concerns that would use my machines for wrapping their cakes in cellophane.

Q. Now, at that time how were the food companies packaging their products, like popcorn and cookies?

A. Well, cookies were packed in bags—they were packed in cellophane bags, some of them—a lot of them were packed in two-piece window bags, we used to call them.

(Testimony of Rene Gaubert.)

Q. Is that the bag that I am handing you?

A. That is right. That is the bag they were using. [84]

Mr. Flehr: I offer this window type cellophane bag in evidence.

The Court: It will be admitted next in order.

Mr. Flehr: To be marked "Plaintiff's Exhibit 2."

(The bag referred to was marked "Plaintiff's Exhibit 2.")

Mr. Flehr: Q. Now, referring again to this Plaintiff's Exhibit 2, will you state if there were any difficulties with that type of bag as far as the food industry was concerned?

A. Yes, there were. One main difficulty of it was the fact it was made out of two pieces of two different materials. Only just the front part of the bag was moisture-proof, and the back part was less moisture-proof. The reason for that, they were trying to keep the cost of the bag down to the minimum by using two materials, because cellophane is much more expensive than the other material. Another disadvantage was the fact that due to the reason they weren't as moisture-proof, and also on appearance, the salability of those packages were not as desirable as the full cellophane bags.

Q. Do you know by whom those bags were manufactured?

A. They were made by several machines.

Q. That is, who was supplying these bags to the food industry?

(Testimony of Rene Gaubert.)

A. I do know that Blake, Moffitt & Towne were supplying them, but they were made back East—I believe they were made back East.

Q. Were there any other bags available to the food industry at that time, that is, a cellophane bag?

A. Yes, there was. A full cellophane bag was available.

Q. Do you know how the seams were fastened together on the full cellophane bag?

A. Yes, they were glued together.

Q. Do you know the extent of use of the full cellophane bag at [85] the time by the industry?

A. Repeat that, please?

Q. I say, what was the extent of the use of the full cellophane bag?

A. It was very small because of the extreme cost of full cellophane bag. The industry could not uphold—that is, pay the premiums that had to be paid on the full cellophane bags and use them in the quantity they would use them for their food products, although they were very anxious to use the full cellophane bag.

Q. Now, when was this condition of the trade called to your attention?

A. It was called in 1934.

Q. By anyone in particular?

A. Yes. I was installing one of my cake-wrapping machines at the Hostess Cake Kitchen here in San Francisco, and the manager of the Hostess

(Testimony of Rene Gaubert.)

Cake Kitchen took me over in his office and he said he wanted to talk to me, and he impressed me with the fact that I should make a machine to make cellophane bags, because he wanted to use cellophane bags for his products, but he couldn't pay the fancy price. He also said if I could make the bags and seal them with heat I could then use the material I was using for those other products and that would be a great advantage.

Q. What was the name of that party?

A. Jack Goldie.

Q. Approximately what date was this?

A. I would say August, 1934.

Q. Then what did you do following your obtaining that information?

A. Well, I immediately was very interested. I became very curious to know how I could do such a job, and I proceeded in thinking about this first, and then I worked on the various means of doing this job, and made some drawings, and then I built the model that is here.

Q. Approximately how long did it take you to develop that model? [86]

A. It took me about two months.

Q. And this, you say, was the first model you produced?

A. That was the frame that I built first.

Mr. Flehr: I offer in evidence the model machine to which the witness has referred.

The Court: Identify it, Mr. Flehr. Is it patented?

(Testimony of Rene Gaubert.)

Mr. Flehr: It is patented by the subsequent patent, yes, but the patent didn't show that structure. We will call it the wooden model, to be marked Plaintiff's Exhibit 3.

The Court: Admitted and marked.

(The model was marked "Plaintiff's Exhibit 3.")

Mr. Flehr: Q. Now, following your making of that machine what did you do with it, Mr. Gaubert?

A. Well, I made some bags on the machine so that I could see whether I could produce bags in that manner with the machine that would be satisfactory. I took some of those bags to Mr. Jack Goldie and I submitted them to him, and he was very, very pleased with the fact that I could produce such a bag, although he hadn't seen the machine, and he particularly asked me to hurry and make the machine and bring it in his plant, that he was badly in need of it.

Q. Did you demonstrate that wooden model to anyone else? A. Yes, I did.

Q. Will you name anyone that you showed the device to?

A. Well, I particularly remember one instance where a customer of mine came into my shop to also look at my wrapping machines, and at that time, after he was through looking over the machines—in fact, I got an order from him—he said I should build a bag-making machine also. He said that he was looking for such a type of machine, that the bags were extremely high, and that someone was going to put out a machine like that some

(Testimony of Rene Gaubert.)

day. I remember [87] he was very interested, and I told him to come in the back, that I had something I thought within his ideas, and I showed him this machine, here. In fact, he was so impressed by it he also gave me an order for a machine that I would furnish as soon as I could.

Q. What is the name of that party?

A. That was Mr. William Meders. He was manager of the Hostess Cake Kitchen in Oakland, California.

Q. Then following the making of that Plaintiff's Exhibit 3, what did you do after that?

A. Well, I remember I explained to Mr. Meders at the time that I wanted to go further than this particular hand model, that I wanted to have a motor-driven machine, and that I was going to work on what I thought would be a logical machine to sell to the trade these principles.

Q. Then you proceeded to develop a commercial machine? A. Yes.

Q. Do you recall approximately how long you worked on it?

A. I know I worked on it from that time up to the time I delivered the first machine, and I remember I delivered the first machine in June, 1935. So, from the time that I was showing this particular machine to Mr. Meders and the time I delivered the other one I was working very strenuously in building this particular model.

The Court: Q. What do you mean by "this particular model"?

(Testimony of Rene Gaubert.)

A. I mean the model disclosed by my application.

Mr. Flehr: Q. Now, you say you developed your first commercial machine, Mr. Gaubert. Will you tell me how this machine differed from this machine we have before us here?

A. It differs—in spite of the fact I have installed a roll of cellophane with an attachment that feeds the roll of cellophane and cuts it—it measures it and cuts it—in other respects it varies in very slight mechanical changes. For instance, the strength, and also for an additional amount of fold blades I put [88] in there, and also because it is driven with a motor—no, pardon me, I take that back—I made a mistake.

Mr. Flehr: Q. This machine we have here, Mr. Gaubert, does that correspond to the actual commercial model which you did manufacture and sell?

A. It does.

Q. Approximately over what period of time?

A. I would say this—you mean from the time I made——

Q. No, over what period of time did you manufacture and sell this machine here?

A. I would say about two years.

The Court: “This machine”?

Mr. Flehr: I am going to offer it in evidence.

The Court: Identify it for the record as you go along.

Mr. Flehr: Well, we will call it——

(Testimony of Rene Gaubert.)

The Court: Is the first patent on this machine?

Mr. Flehr: Yes. It isn't identical, however, with what is shown in the patent.

The Court: Identify it for the purpose of the record.

Mr. Flehr: We will call it the Commercial Simplex Machine with the cellophane roll attachment. I will offer that machine in evidence, the same to be marked Plaintiff's Exhibit 4.

Mr. Schapp: If your Honor please, may I make an objection at this time? I particularly made a request of counsel to offer the machine in evidence to-day as actually shown in the patent, to bring the machine that formed the basis of his patent application, and instead of doing that counsel for the plaintiff brings in another machine which has been changed considerably, and particularly which has been changed to look much more like the defendant's machine than the patented machine does.

The Court: Well, I take it the patented machine in suit is available and will be here soon? [89]

Mr. Flehr: I think there is a misunderstanding on that, your Honor. It is true this is not the first commercial machine from which the drawings were made on the application. I don't know if that is available or not, I will find out. This is a machine which was manufactured for several years by Mr. Gaubert, and he stated that to be substantially the same as the first machine, except for the minor changes——

(Testimony of Rene Gaubert.)

The Court: But there is a demand made by counsel for the patent in suit.

Mr. Schapp: This machine does not correctly represent the patent in suit.

The Court: Where is the patented machine?

Mr. Flehr: Let me explain again. We do consider this to be the patented machine. As I say, whenever commercial models are put out, from time to time it is customary for all manufacturers to improve it and get better operations.

Q. Now, Mr. Gaubert, do you have a machine corresponding to the first one you did manufacture?

A. This embodies all of the features.

The Court: Just a minute. Have you got the patented machine now?

A. Yes, sir.

Q. Have you got a duplicate of that?

A. Yes, sir.

Q. Is this the best duplicate you have got?

A. This is the duplicate of it, plus other things which were put on, which I can take off, if you wish, and make a duplicate of this.

The Court: What I am trying to get at, he has made a demand. Is the machine available?

Mr. Flehr: Q. Mr. Gaubert, the first machine you sold to the Hostess Company, is that available?

A. No, it is not available. I tore it down. [90]

The Court: All right.

Mr. Flehr: I will endeavor to find out, your Honor, if he has any machine available which we might say hasn't got some of these minor things on that Mr. Schapp is objecting to.

(Testimony of Rene Gaubert.)

The Court: What machine have you in mind?

Mr. Schapp: I have in mind the machine from which the Patent Office drawings were made.

The Court: Maybe they have improved it.

Mr. Schapp: Those improvements are not covered by the patent.

The Court: They say the machine is not available. I don't know how I can ask them to bring one in.

Mr. Schapp: I would like to ask the witness some questions on that.

The Court: Very well.

Mr. Schapp: Q. Mr. Gaubert, have you any machine available that looks exactly like the patented machine?

A. Not exactly. They all have all of the features that you see here in that machine on it, all except the feed roll mechanism, which I can take off.

Q. Is that the nearest machine to the one that the patent drawings were made from?

A. It is one of the nearest.

Q. It is one of the nearest?

A. It is the nearest I have to-day.

Q. Have you any machine which comes nearer to the patented machine than this one?

A. No, sir.

Q. Have you any machine which doesn't show the roll feed? A. No, sir.

Q. You have no machine in your possession?

A. No, because I took the roll feed and installed it on the machines I had built [91] just exactly like

(Testimony of Rene Gaubert.)

this. I took the roll feed and put them on these machines. Maybe Mr. Schultz has one of those machines. I told him the machine.

The Court: Q. Is that the best machine you have to conform to this patent, the one you sold to him?

A. I would say yes.

The Court: Well, proceed.

Mr. Flehr: Q. Now, you say you did manufacture this first commercial device you referred to, Mr. Gaubert, in 1935? A. Yes, sir.

Q. I don't recall, but did you say to whom you sold that first machine?

A. Yes, I sold it to the Hostess Cake Kitchen in San Francisco.

Q. And what can you say with respect to the use of that machine by the Hostess Company?

A. Repeat that, please?

Q. I say, do you know anything first hand about the use of that machine by the Hostess Company?

A. I do know that the first day I delivered it to them they put it in use, and in fact they had hired a girl to operate this machine, and I remember delivering the machine to them personally, and I remember them putting it in action—that is, I sat down and worked the machine, and then they asked me to let the girl do it, and I let the girl do it, and showed her how to operate the machine, after which I left them and they operated the machine from that day on. I remember also that Mr. Goldie was very im-

(Testimony of Rene Gaubert.)

pressed, and I remember some statements which he made, and one of them was to protect myself on the patent situation, and the second one was I would sell a whole lot of machines. In fact, he said he would help me in selling them, he was so pleased with the job I had done.

Mr. Flehr: Q. Now, after that did you make a sale of a machine to Mr. Meders?

A. The second machine was delivered to Mr. [92] Meders.

Q. Then did you go into the manufacture and sale of these machines on a commercial scale?

A. I did.

Q. What sort of a shop did you have at that time?

A. I had a very small shop. In fact, it was located in sort of a back yard,—wooden building in back of my home.

Q. Has your shop grown since that time?

A. Yes, sir.

Q. Then I understand from what you have said that subsequent to that first manufacturing and the first few sales you did make some changes to the machine? A. Yes, sir.

Q. Then this Plaintiff's Exhibit 4 represents the machine which you later manufactured and sold? A. That is right.

The Clerk: Is that in evidence, Mr. Flehr? Did you direct it be in evidence, your Honor?

Mr. Flehr: I thought I offered it in evidence

(Testimony of Rene Gaubert.)

and he made an objection, and I think——

The Court: To clear up the record, offer it.

Mr. Flehr: Yes. I offer in evidence the machine the witness has been testifying about, the machine being a commercial Simplex machine manufactured and sold by Mr. Gaubert, and having a top cellophane roll support.

Mr. Schapp: Objected to, your Honor, in view of the fact that that machine does not truly represent the patented machine, I object to the introduction of this as an exhibit as representing the patented machine.

The Court: Well, I gave you an opportunity to examine him and he stated that is the nearest he had to the patent machine, the only difference between the machine now is he has made some improvements on them.

Mr. Schapp: It is rather confusing, because these improve- [93] ments are the very improvements, or are some of them, that the defendants made.

The Court: Very well, you can develop that. It will be admitted and marked.

(The device referred to was marked "Plaintiff's Exhibit 4.")

Mr. Flehr: Q. Mr. Gaubert, I hand you a paper and ask you to identify it.

A. Yes. I received this letter on February 17, 1936, from the Schultz Food Company, signed by Mr. Charles F. Schultz.

(Testimony of Rene Gaubert.)

Mr. Flehr: Your Honor, I would like to read this letter to the Court.

Mr. Schapp: May I see it? (Receives.)

Mr. Flehr: Addressed to Simplex Wrapping Machine Company, 2437 E. 11th Street, Oakland, California, dated February 17, 1936, on the letter-head of Schultz Food Company:

PLAINTIFF'S EXHIBIT 5

“Dear Mr. Gaubert:

“The Bag Folding and Sealing machine which we purchased from you has improved the appearance of our package and made filling much easier. We have decided to make all of our own bags and ask that you please send us another machine, as soon as possible, for making square bottom bags of the following sizes: $5\frac{1}{2}'' \times 11\frac{1}{2}''$, $5\frac{3}{4}'' \times 11\frac{1}{2}''$, and $6'' \times 2''$.

“Frankly, we were a little skeptical when we bought the first machine. The first day of operation changed our minds, for it has fulfilled all your claims and all our expectations. We are glad to recommend your machines to anyone who is interested in reducing bag costs.

“Yours most sincerely,

SCHULTZ FOOD COMPANY

(Signed) CHAS. F. SCHULTZ

Charles F. Schultz

Manager.” [94]

(Testimony of Rene Gaubert.)

I offer this letter in evidence, the same to be marked "Plaintiff's Exhibit 5."

The Court: It will be admitted and marked.

(The letter referred to was marked "Plaintiff's Exhibit 5.")

Mr. Flehr: Q. Mr. Gaubert, I believe you testified that you did make a sale to the Schultz Company. A. Yes, sir.

Q. That is referred to in that letter?

A. That is right.

Q. Subsequently, did you make a sale of another machine? A. Yes.

Q. Do you recall the approximate date of the sale of the second machine?

A. No, I don't. It must have been very close to the date of the letter, because this was actually an order for another machine.

Q. Mr. Gaubert, can you tell me approximately how many bag-making machines you have manufactured and sold? A. Yes, I can.

Q. Over the period of time that you have been manufacturing?

A. In 1935 I sold eight machines. In 1936—probably I have to look at the memorandum, here, it is kind of difficult to remember—in 1935 I sold eight machines; in 1936 I sold eleven machines; in 1937 I sold twenty-nine machines; in 1938 I sold forty-nine machines; in 1939 I sold 27 machines; and in 1940 I sold three of them.

Q. That is, three machines of what type, Mr. Gaubert? A. Of this type.

(Testimony of Rene Gaubert.)

Q. Plaintiff's Exhibit 4? A. That is right.

Q. You did sell additional machines in 1940 of another type? A. Yes, sir.

Q. What type was that?

A. They were an automatic machine that I had built in 1940, and which is over there (indicating).

Q. And that is the machine that I am referring to here? A. That is right.

Mr. Flehr: I offer in evidence the last machine that the [95] witness has referred to, the same to be referred to as the all automatic machine, and to be marked Plaintiff's Exhibit 6.

Mr. Schapp: That is objected to, your Honor, because that machine absolutely is a later development, and does not seem to have anything to do with the patent. The plaintiff has, himself, stated that he didn't bring out this machine until very recently, and the patent is three years old, so that could not possibly have any bearing on the patent situation. I object to it as being absolutely immaterial and irrelevant to the issues in suit.

Mr. Flehr: I am simply putting it in evidence as a commercial success. We will later show that this machine does incorporate the invention of the patent. If you wish, I can introduce it for the purposes of identification and later I can show that the patent in suit does also cover the full automatic machine.

Mr. Schapp: If your Honor please, our position is it doesn't make any difference whether the pat-

(Testimony of Rene Gaubert.)

ent covers their machine or not, the issue is whether it covers our machine. It has nothing to do with the issue here.

Mr. Flehr: Yes, your Honor, it does. The element of commercial success is quite an important element in a patent——

The Court: It might become material, and with the assurance you will connect it up I will allow it.

Mr. Schapp: Very well, your Honor.

(The device was marked "Plaintiff's Exhibit 6.")

Mr. Flehr: Q. In general, Mr. Gaubert, what has been the reaction of the trade to the machines of the type of Plaintiff's Exhibit 4?

A. Well, the trade reacted very enthusiastically about it. Everyone commented on my ability to be able to produce such a relatively simple machine that would do so much for them with so little and that would allow them to use so many [96] cellophane bags when they weren't able to before.

Q. I will hand you a number of papers and ask you to identify them.

A. This is a letter I received from the Los Angeles Pretzel Company, Inc., dated March 2, 1936. It was written to me by Mr. Gerberich.

The Court: Read it.

(Testimony of Rene Gaubert.)

PLAINTIFF'S EXHIBIT 9.

A. "Simplex Wrapping Machine Company,
2437 East Eleventh Street, Oakland, California.
Attention, Mr. M. R. Gaubert.

"Gentlemen:

"After using your cellophane bag making machine for a period of over three months, we wish to state that the machine is working very satisfactorily and also has been an economical factor in our cellophane bag department. We can highly recommend this machine to cellophane bag users. Wishing you much success with this machine, we are,

"Yours very truly,

"LOS ANGELES PRETZEL
COMPANY, INC.,

By P. F. GERBERICH
President."

The Court: Q. What machine was that?

A. That is the old machine here (indicating).

Mr. Flehr: Plaintiff's Exhibit 4.

Mr. Schapp: If your Honor please, I am raising an objection to the reading of these letters. If they want to produce those witnesses that is all right, but to just produce letters written by them, as far as I can see it is purely hearsay and immaterial.

Mr. Flehr: Q. Mr. Gaubert, do you know the party who wrote that letter, there? A. Yes.

(Testimony of Rene Gaubert.)

Q. Do you know his signature?

A. Yes, I do.

Q. Can you identify that signature?

A. Yes, it is his signature.

Mr. Flehr: Your Honor, this letter the witness has referred [97] to is simply being offered as further evidence of commercial success, and to bring in evidence with respect to the fact that the trade really did get something that they wanted.

The Court: For that limited purpose I will allow it. Proceed.

A. I have another letter from the Grandma Cookie Company, dated September 21, 1935, addressed to Simplex Wrapping Machine Company, 2437 East Eleventh Street, Oakland, California.

PLAINTIFF'S EXHIBIT 9 (continued)

“Gentlemen:

“We are pleased to inform you that we are very well satisfied with the Simplex Bag Folding Machine we purchased from you a few months ago. It has proved itself very easy to operate and most dependable. The bags it produced are strong and easy to fill. With the use of the machine, we are able to make very definite savings in our bag costs. We do not hesitate to recommend the Simplex to anyone who is interested in cutting the cost of bags.

“Yours very truly,

“GRANDMA COOKIE COMPANY,
By F. C. BUSCHE.”

(Testimony of Rene Gaubert.)

The Court: Q. Did you receive that letter on or about that date? A. Exactly.

Q. Is that the original?

A. This is a photostatic copy. The original was used to print my pamphlet. I made up a pamphlet at that time, your Honor, and the original letter was used in the printing.

Q. How did you get that signature there?

A. It is a facsimile.

The Court: The objection is good. He is entitled to the best evidence.

Mr. Flehr: Q. Do you have the original document?

A. I don't, but here is one I have (producing).

Q. Take this one you just read, from the Grandma Cookie Company, [98] you haven't that?

A. I don't think I have.

Q. Will you please check your files and produce it if you have it?

A. If I can. It was smeared in the printing of the pamphlet. They smeared the letters. They used these letters and put ink on them, and I probably threw them away.

Q. This letter you just read, on the letterhead of Grandma Cookie Company, do you know the name of the writer? A. Yes, I do.

Q. Do you know his signature?

A. Yes, I do.

Q. Is that his signature? A. It is.

The Court: That is not his signature——

(Testimony of Rene Gaubert.)

Mr. Flehr: It is a photostatic copy.

The Court: But it is not his signature.

Mr. Flehr: I will try again to have him find it.

Q. The next letter you have there, Mr. Gaubert—

A. Is an original letter written from Cal-Ray Bakeries, dated September 23, 1936:

PLAINTIFF'S EXHIBIT 7

“The Simplex Wrapping Machine Company,
2437 East Eleventh Street,
Oakland, California.

“Gentlemen:

“Generally we are reluctant to write letters of recommendation regarding equipment, but in this instance are pleased to state that your bag making machine is one of the outstanding units in our plant. This unit means time and money saved in many ways, such as original cost of bags, elastic supply in various sizes, and fresh stock. We sincerely wish success to your company.

“Yours very truly,

CAL-RAY BAKERIES,
D. G. NEUMAN.”

Q. Do you know Mr. Neuman, who signed that letter? A. Yes, I do.

Q. Do you know his signature?

A. Yes. [99]

(Testimony of Rene Gaubert.)

Q. Can you identify his signature?

A. Yes. It is his signature.

Mr. Schapp: May I see them?

Mr. Flehr: Q. What machine did that letter have reference to, Mr. Gaubert?

A. It had reference to one of the very earliest machines I built of this type.

Q. That is, of the type of Plaintiff's Exhibit 4?

A. That is right.

Q. The same type as supplied to Mr. Schultz?

A. Exactly.

Mr. Flehr: I offer in evidence this letter which the witness has just identified, dated September 23, 1936, from the Cal-Ray Bakeries.

The Court: It will be admitted and marked.

Mr. Schapp: Objected to as being purely hearsay.

The Court: This is the original?

Mr. Flehr: The original.

Mr. Schapp: If your Honor please, I don't think it makes any difference whether it is the original or a copy, as long as they don't produce the witness, himself. The witness, himself, is the man—

The Court: It goes to the weight of the testimony. It may or may not. Produce the writer of that if you wish. This is some evidence of commercial value of the product.

Mr. Schapp: Very well.

The Court: Proceed. It may be admitted and marked.

(Testimony of Rene Gaubert.)

Mr. Flehr: The exhibit to be marked "Plaintiff's Exhibit 7."

(The letter was marked "Plaintiff's Exhibit 7.")

Mr. Flehr: Q. Now, this last paper I am handing you, Mr. Gaubert, can you identify it?

A. Yes, I do.

Mr. Flehr: I simply thought I would have him identify it and later on I will bring in the originals if they are found. [100]

The Court: I will allow that for the purposes of identification only. That will be admitted and marked.

Mr. Flehr: I thought I would save time and have him testify from the copy. Do you wish to do that? Let the witness identify the copy, subject to production of the original if they can be found?

Mr. Schapp: Yes.

The Witness: This is written from Mother's Cake & Cookie Company, dated March 28, 1936.

PLAINTIFF'S EXHIBIT 9 (Concluded)

"Simplex Wrapping Machine Company,
2437 East Eleventh Street,
Oakland, California.

"Gentlemen:

"The Simplex Bag Folding and Sealing Machine we purchased from you has now completed its ninth month of successful operation. This has done everything you said it would do, and more.

(Testimony of Rene Gaubert.)

“As I remember it, you said the machine would deliver approximately 600 cellophane bags per hour. As a matter of fact, since you have increased the speed of the motor, it actually produces an average of from 900 to 1000 bags per hour. We are very pleased with the uniform quality of the bags it produces.

“The machine paid for itself in the first four months,—on the savings in bag costs alone. Our full cellophane bags now cost us only about \$5 per thousand, as against the approximate \$10 we would have to pay for this bag.

“In other words, we can now use a cellophane bag and get the extra display value and full moisture proof protection for less than it would cost us to pack our products in wax bags with cellophane face.

“You are at perfect liberty to use this letter in any way you see fit and to refer any interested parties to us. [101]

“Yours most sincerely,

W. J. MEDER,

“MOTHER’S CAKE & COOKIE
COMPANY.”

The Court: Take a recess for a few minutes.

(Recess.)

Mr. Flehr: Q. Can you demonstrate the operation of this Plaintiff’s Exhibit 4?

A. Yes, I can.

Q. Will you please do so?

(Testimony of Rene Gaubert.)

A. When this machine is warm enough so I can.

Mr. Flehr: Can we move it up, your Honor?

The Court: Yes, surely.

Mr. Flehr: Q. Now, Mr. Gaubert, would you please tell us what you are doing as you do it?

A. Well, I take a sheet of cellophane and place it under the mandrel and leave it rest and press the pedal. It happens in this case that the sheet comes from a roll; it could have been pre-cut, which was the first machine. I place another sheet and remove the bag. It is now made. Of course, I am a very poor operator. I will explain, that after the sheet is placed on the machine and the pedal is tripped—I will slow it down and demonstrate it as I am talking—I will trip the pedal, which starts the machine on the cycle, and just by turning the belt I will endeavor to show you what happens. Now, the plate comes down then the sheet is folded on one side, on the other, these blades come in on the bottom of the bag to form a line on which the bottom is to be folded over by this bottom folding blade, and then as I keep going you will notice that the bottom is being folded over as I said before, and that is this bottom folding blade holds the fold below the mandrel, and the folding blade will retract, and pending the application of the heat by the heater—you see those blades are coming out now, however the folds are held in position pending the application [102] of the heat, which is now coming down and which has now happened. Now, this is a

(Testimony of Rene Gaubert.)

sealing whereby everything (showing bag)—it is going to be a little hot, because I went too slow. Now, the next sheet has come down and all of these members are retracted. The bag is now made on the end of the plate and can be removed.

Mr. Flehr: I will offer in evidence one of the cellophane bags made during the demonstration, the same to be marked Plaintiff's Exhibit 8.

(The cellophane bag referred to was marked "Plaintiff's Exhibit 8.")

Mr. Flehr: Q. Now, Mr. Gaubert, this machine here, Plaintiff's Exhibit No. 3, could you show us generally how that machine is used?

A. Yes. On this machine the sheet is placed underneath the plate and the foot pedal actuates the motion to bring the plate down and fold the side margins of the sheet over the plate—I am doing it as slow as I can. Then there is a folding blade—I mean a knife blade that is being put over by hand on which the bottom is to be folded by the bottom folding blade, which works automatically in this case. Now, the knife folding blade is retracted and the heater brought down automatically, and if this was hot the bag would have been made. This would have been a true bag the same as the other bag.

Q. Now, this bag I have, Plaintiff's Exhibit 8, Mr. Gaubert, will you just briefly point out the construction of that bag when it is completed?

A. The construction is that the sheet has been

(Testimony of Rene Gaubert.)

folded over the side and bottom, and over the overlap portions of the bottom fold and the lengthward fold we have applied heat and have sealed them together with heat. [103]

Q. Now, when you heat-sealed the bottom of the bag how many pieces of cellophane did you fasten together by the heat seal?

A. Several pieces. There is at least—in some places there is three thicknesses of cellophane and in other places there is—I would have to count them—let's see: one, two, three, four, five pieces of cellophane that are glued together.

Q. As I understand, the two side walls of the bag are not attached together by the heat seal at the bottom?

A. No, the construction of this bag is such that the portions that are sealed are not sealed in any way to the front portion of the bag. In other words, the bottom has been folded, as we know, over the plate, and the plate has kept the heat from transferring to the front portion of the bag.

Q. Now, you refer to a part of that machine, part of Plaintiff's Exhibits 3 and 4, over which you folded the bottom. Can you explain again the function of that part?

A. Well, this blade is very necessary in order to be able to fold the bottom.

Q. Can you demonstrate that by hand on a table somewhere, Mr. Gaubert?

(Testimony of Rene Gaubert.)

A. I certainly can. I can do it over this. Assuming that this is the plate, and pieces of paper. (Demonstrates)

Q. Just explain what you are doing as you do it.

A. I am folding one side over this plate, then the other side, then I am trying to duplicate this blade that is doing this bottom folding. It will be found it is necessary to have another line fold on top, in order to be able to fold the bottom and in order to retain the fold. I mean to say this would never fold—this bottom would never fold, it takes this blade and it takes that blade to fold over this one. Then retract the blade, run over the bag, as it is now. But the necessity of this blade is very apparent, because if it wasn't for this blade we couldn't fold over the bottom, [104] some other method would have to be used to seal this bottom.

Q. What would happen if you didn't have a member on top?

A. The fold wouldn't happen.

Q. What would happen?

A. If you didn't have this blade, you mean?

Q. Yes.

A. If we didn't have this blade no fold would happen, you couldn't fold it.

Q. This is what I mean, Mr. Gaubert, suppose you didn't have your top blade on top of the mandrel, and you endeavored to fold over the bottom, what would happen?

(Testimony of Rene Gaubert.)

A. We would lose our fold.

Q. Demonstrate that to the Court.

A. There is what would happen (demonstrating).

Q. As you have demonstrated, the top layer of cellophane would simply wrinkle up and not fold on a proper line?

A. They would simply go away from their position.

Mr. Flehr: Your Honor, I would also like to have this additional machine demonstrated while we are demonstrating machines, however it is not heated up.

The Court: Well, get it ready during the recess just before we reconvene this afternoon, and we will have the demonstration at two o'clock.

Mr. Flehr: Q. Now, Mr. Gaubert, when did you first see the machine which is charged here to be an infringement of your patent manufactured by the Schultz Food Company?

A. I saw it this year.

Q. And do you recall the approximate date?

A. Not exactly. Let's see—no, I don't recall the exact date.

Q. Do you recall where you saw the machine?

A. Yes, I do. I saw it at Koster Candy Company.

Q. Was the machine operating at the time you saw it?

(Testimony of Rene Gaubert.)

A. It wasn't working, but Mr. Koster showed me the operation of it. [105]

Q. Now, Mr. Gaubert, back at the time you first placed your commercial machine on the market, do you know whether or not there were any other machines available which the food industry could buy for the purposes of making their own cellophane bag requirements?

A. Well, I inquired whether there were machines that could be purchased and operated by people that were using bags, and the answer I received was negative. Mr. Meder, from Mother's told me that he had looked around to see what he could do, he was looking at every magazine——

Mr. Schapp: Objected to as hearsay.

The Court: The objection will be sustained.

Mr. Flehr: Just a moment. Will you read the statement back the witness just made?

The Court: Read it, Mr. Reporter.

(The last answer was read by the reporter as follows:

“A. Well, I inquired whether there were machines that could be purchased and operated by people that were using bags, and the answer I received was negative. Mr. Meder, from Mother's, told me”——)

Mr. Schapp: That is hearsay.

The Court: Sustained.

Mr. Flehr: We will strike out what Mr. Meder said.

(Testimony of Rene Gaubert.)

Q. Then as far as you know there was no other machine available at that time? A. No, sir.

Q. Now, would you just review briefly again the advantages of your bag, Plaintiff's Exhibit 8, over the half cellophane bag or window type cellophane bag, Plaintiff's Exhibit 2?

A. Well, the bag made on my machines has only two seams, whereby this one has three longitudinal seams. This one is made—I would say the two-piece cellophane bag is made out of two pieces, [106] and one of them is not as moisture-proof as the other, whereby this bag is not as moisture-proof as the full cellophane bag. Again, it doesn't have the sales appeal of this bag because of the fact it is not visible, it is not transparent all the way around.

Q. This Plaintiff's Exhibit 2, do you know if that is a glued bag or heat-sealed bag?

A. Yes, it is a glued bag.

Q. You mean by "glued" that adhesive has been applied and the two parts fastened together by adhesive? A. That is right.

Mr. Flehr: Your Honor, I think this is all from this witness until we demonstrate the other machine.

The Court: It is five minutes to twelve. Immediately before we proceed get the machine ready, and we will take the adjournment until two o'clock.

(A recess was taken until two o'clock p.m.) [107]

Afternoon Session—2:00 o’Clock

RENE J. GAUBERT, Recalled

Direct Examination (Resumed)

Mr. Flehr: I wish to offer for identification at this time the copies of letters concerning which the witness testified, the letters being dated September 21, 1935, March 2, 1936, and March 28, 1936, bearing the names Grandma Cookie Company, Los Angeles Pretzel Company, Inc., and Mother’s Cake & Cookie Company, respectively.

The Court: They may be marked.

(The letters referred to were marked “Plaintiff’s Exhibit 9 for identification.”)

Mr. Flehr: Q. Mr. Gaubert, will you identify, if you can, these papers I am handing you?

A. Yes, sir; they are the pamphlets that I made covering the bag-making machine.

Q. Which machine, Mr. Gaubert?

A. The one behind the larger machine, there.

Q. That is Plaintiff’s Exhibit No. 4?

A. Yes, sir.

Q. In other words, these were circulars which you used? A. That is right.

Q. In the sale of Plaintiff’s Exhibit 4?

A. That is right.

Mr. Flehr: I offer in evidence the two circulars which the witness has identified, to be marked Plaintiff’s Exhibit 10.

(The circulars referred to were marked “Plaintiff’s Exhibit 10.”)

(Testimony of Rene Gaubert.)

Q. Now, Mr. Gaubert, I wish you would please demonstrate to the Court this Plaintiff's Exhibit 6.

Mr. Shapp: If your Honor please, I wish to offer an objection to the demonstration of this machine. According to the tes- [108] timony of this witness this machine was not made until 1940; that is about three years after the patent issued. It doesn't look anything like the patent; it is a thoroughly reorganized machine. As a matter of fact, it has been reorganized to compare with our machine, and in its operation it seems to be almost exactly the same as our machine. But it is in no wise in issue; the sole thing that is in issue is the patent, whether our machine infringes the claim of the patent. If they have developed a machine that looks something like—maybe it is a copy—when you compare ours, that can have no possible bearing on the questions in issue.

Mr. Flehr: Your Honor, this machine was put in evidence to show what the plaintiff is manufacturing, and we have shown commercial success in the use of this invention.

The Court: Just a moment. With this machine?

Mr. Flehr: We will develop presently that this machine also incorporates the invention and is being manufactured and sold by this plaintiff.

The Court: For that limited purpose, I will allow it. Proceed.

(Thereupon the witness proceeded to demonstrate the operation of the machine, Plaintiff's Exhibit No. 6.)

(Testimony of Rene Gaubert.)

The Witness: There are certain adjustments that have to be made. I didn't have a chance. This machine can be regulated as to speed (demonstrating). My current went on the blink, here.

Mr. Flehr: Q. Now, Mr. Gaubert, you have just operated the machine for a short period of time and made a number of bags with the machine.

A. Yes, sir.

Q. Can you operate the machine at a slow speed, then, so as to more clearly show what is happening?

A. By hand? [109]

Q. Any way you can. Just explain what you are doing, Mr. Gaubert.

A. Now the machine is feeding the bag through the rotary motion of these rollers, and as soon as the bag has been fed, the machine cuts the sheet or the bag—finished bag. Then the blades for folding over the bottom come in position on the end of the plate, and as soon as they are in that position the other little bottom folder blade comes over and folds the bottom, your Honor.

The Court: I can see it.

The Witness: Folds it right over. Then after that has been folded over and transported over the plate, the heater comes over and seals the bottom and the longitudinal seams at one shot. My belt is slipping. Now the bottom fold-over blade retracts and then the plate is moved into those rubber rollers in order to move the bag that has been made over the plate, as you can see. There is the bag coming out. Now the bottom folding repeats itself again.

(Testimony of Rene Gaubert.)

The Court: And cuts it.

A. That is right. And then it feeds it over again.

Mr. Flehr: Q. How is the paper folded on this machine, Mr. Gaubert?

A. The paper—over the mandrel, you mean?

Q. Yes. A. The paper is folded—

The Court: As it goes in the slot?

A. As it goes into the plate it is being folded over.

Mr. Flehr: Do you wish to see anything more with respect to the operation, your Honor? We will have more testimony concerning the details of the machine later on.

The Court: I perceive it. If I have failed to see anything, point it out.

The Witness: There is a thermostat control.

The Court: That is on my icebox. [110]

The Witness: I have it on this one—a small detail introduced lately. When the heater is on, if you should leave it so long that that would get too hot, this would cut it off. And I have the variable speed which controls the speed. This is an important factor at times to regulate the time of application of heat. Heavy material wants more time.

The Court: Q. Did you patent that?

A. We have applied for patents.

Q. When was this patented? You made application in 1940?

(Testimony of Rene Gaubert.)

Mr. Flehr: Your Honor, this machine has features on it which the other machine does not have, Exhibit 4, and he is referring to those improved features which he is patenting in addition.

The Witness: I have also developed an electric eye attachment which fits on the end of this machine so that printed bags can be made automatically and the printing spotted.

The Court: Q. Are you familiar with the defendants' machine? A. Somewhat.

Q. Suppose I would allow both of you to go in the market and take your chances on the product,—what is your answer to that?

A. Well——

The Court: Well, I guess that is what we are here for.

Mr. Flehr: Q. Mr. Gaubert, when did you first start to have competition in the manufacture and sale of bag-making machines of the type of your Exhibit 4?

A. Well, I first was aware of that machine in 1936.

Q. Which machine are you referring to?

A. Rather of a competitive machine, in 1936.

Q. Do you remember the name of that machine?

A. Yes, I do; it was a Wrap-Aid.

Q. I hand you a paper and ask you if you can identify it. [111]

A. Yes, this is a page of the "Modern Packaging," and this is the Wrap-Aid machine.

(Testimony of Rene Gaubert.)

Q. You mean that the Wrap-Aid machine to which you referred is illustrated?

A. Is illustrated on one side of the page.

Q. On the page numbered 304?

A. On page No. 304 is right.

Q. You say that machine appeared upon the market in 1936?

A. I heard of it appearing on the market and I saw it in magazines advertised.

Q. Now, tell me, was that a fully automatic machine? A. Yes, sir.

Q. You say that that was manufactured to your knowledge in 1936? A. Yes.

Q. And was called to your attention at that time?

A. It was called to my attention, yes, sir.

Mr. Flehr: Your Honor, in view of the statement made by opposing counsel to the effect that this party copied their machine, I wish to put this in evidence.

The Court: It will be admitted and marked.

Mr. Flehr: I offer this instrument the witness has just identified, being an advertisement from—what was it? A. “Modern Packaging.”

Mr. Flehr: Being an advertisement of the Wrap-Aid Machine Company, Inc.

The Court: Where did they manufacture this machine? A. In New Jersey, your Honor.

Mr. Flehr: The same to be marked Plaintiff's Exhibit——

(Testimony of Rene Gaubert.)

Mr. Schapp: I object to this as entirely immaterial.

The Court: What is the purpose of this offer?

Mr. Flehr: It is this: Counsel for the Defense inferred that this Plaintiff had copied the automatic feature of his machine in making his automatic machine, and we wish—— [112]

The Court: Copied it from what?

Mr. Flehr: Copied from the Schultz Machine.

The Court: Is this the Schultz machine?

Mr. Flehr: No, your Honor, but it is an automatic machine.

The Court: It is remote, then, isn't it?

Mr. Flehr: It simply is an automatic machine. I don't like to have the inference that we copied their machine instead of them appropriating our invention.

The Court: I will sustain the objection at this time so that we do not prolong this. You may re-offer it if necessity occurs later on. The fact that the New Jersey machine has an automatic feature has no relationship here.

Mr. Flehr: I am satisfied, your Honor, as long as that inference has no bearing upon this case.

The Court: All right; proceed.

Mr. Flehr: Q. Mr. Gaubert, this morning you testified concerning the number of machines which you had manufactured and sold of the type of Plaintiff's Exhibit No. 4. A. Yes.

(Testimony of Rene Gaubert.)

Q. Since the time you put your machine upon the market. Now, you have also sold a number of the automatic machines? A. Yes, sir.

Q. According to Plaintiff's Exhibit 6?

A. Yes, sir.

Q. How many of those machines have you sold?

The Court: This new machine?

Mr. Flehr: Yes.

A. I have sold 69 of those machines.

The Court: This is the one that you perfected in '40?

Mr. Flehr: That is right.

The Witness: The one I have just demonstrated your Honor.

The Court: Q. With all these new features on it? [113] A. Yes, your Honor.

Q. Did all 69 have those identical features?

A. Yes, your Honor.

Q. Nothing added since?

A. No, your Honor, nothing has been added.

The Court: All right; proceed.

Mr. Flehr: Q. Of the type of Plaintiff's Exhibit No. 4, will you tell me what has been the gross sales of those machines?

A. The gross sales amounted to \$128,000.

Q. And what has been the gross sales of the full automatic type according to Plaintiff's Exhibit No. 6? A. \$72,000.

The Court: What is the other, Exhibit 4?

Mr. Flehr: That is Exhibit No. 6.

(Testimony of Rene Gaubert.)

The Court: I know, but there are two types, you said.

Mr. Flehr: Yes, he first testified, I believe, \$125,000.

The Court: That is No. 6?

Mr. Flehr: For Exhibit No. 4.

The Witness: No, No. 4 was \$128,000.

Mr. Flehr: Q. \$128,000? A. That is right.

The Court: The small one?

A. That is right.

Mr. Flehr: Q. Then how about Exhibit No. 6?

A. Exhibit No. 6 was \$72,000.

Mr. Flehr: That is all.

Mr. Schapp: If your Honor please, I just want to raise one more objection to this line of questioning. He hasn't asked any questions as to how many they have sold of the machine that actually forms the subject-matter of the patent. They always relate to improved machines, and these big figures merely relate to improvements that were made afterwards; they don't relate to the original patented machine. [114]

Cross Examination

Mr. Schapp: Q. Mr. Gaubert, this morning you showed us a number of letters which you had received, kind of letters of recommendation. Were these letters sent to you spontaneously or did you ask for them?

A. I asked for some letters of recommendation.

(Testimony of Rene Gaubert.)

Q. You asked for those letters of recommendation? A. Yes, I did.

Q. For the purpose of incorporating them in a pamphlet, I suppose? A. Yes, sir.

Q. Is that the idea? A. Yes, I did.

Q. Is there any machine at the present time that you know of in existence that was made exactly in accord with the showing of the patent?

A. Yes, sir.

Q. About how many of those machines are in existence?

A. Oh, I wouldn't be able to say. All of the machines that I produced of item No. 4 are in accordance with the patent.

Q. I am not inquiring about Exhibit 4; I am inquiring about the machine from which the patent drawings were made.

A. Well, I must repeat that all of those machines incorporate all of the items—practically all of the items covered by the drawings.

Q. Mr. Gaubert, will you please answer my question? A. I will.

Q. How many of those machines from which the patent drawings were made are in existence at the present time?

A. About 139 machines, or something like that.

Q. About 139 machines.

The Court: That would be Exhibit 4, would it?

A. Yes, sir.

Mr. Schapp: I beg your pardon.

(Testimony of Rene Gaubert.)

The Court: That would be Exhibit 4.

Mr. Schapp: I am not inquiring about Exhibit 4; I am inquir- [115] ing about the machine that is shown in the patent.

The Court: The original patent.

The Witness: The machine that is shown in the patent is the machine that I sold, and the only difference was that I added——

Mr. Schapp: Q. Now, Mr. Gaubert, please understand me right; I am not asking about these; I am not asking about the machine you showed here; I am asking about the machine from which the patent drawings were made.

A. I sold 139 machines.

Q. Of that particular machine from which the patent drawings were made? A. Yes.

Q. Did those machines have feed rolls on them?

A. Feed rolls?

Q. Yes. A. Yes.

Q. Then it is not the machine from which the patent drawings were made, is it?

A. Yes, sir.

Q. Did the machine from which the patent drawings were made have a feed roller attachment?

A. No, the first machine did not have it; it was added on the——

Q. It was added. I asked you now how many of those unchanged machines to which nothing was added have been sold?

A. The fact remains that practically all of the

(Testimony of Rene Gaubert.)

machines that I have sold without the feed roll attachment were at a later date supplied with the feed roll attachment and thereby they became one of those.

Q. How many did you sell without the feed roll attachment?

A. Before installing the feed roll attachment on the machine I probably sold, I would judge, half a dozen machines.

Q. Half a dozen machines? A. Yes, sir.

Q. So you really sold only about half a dozen machines that exactly looked like what the patent drawings show?

A. No, sir; I must contend that all of the other machines were the same except [116] that they had an extra item placed on them.

The Court: Added improvements?

A. Added improvement.

Mr. Schapp: Q. You say you have no original machine available at the present time?

A. Yes, there are.

Q. Why didn't you bring it up here?

A. There is no original machine; I call them the original machines.

Q. Well, the machine from which the patent drawing was made—is that machine available?

A. It is right here on the floor.

Q. Was the patent drawing made from that machine?

A. No, the patent drawing was made before the

(Testimony of Rene Gaubert.)

machine. I beg your pardon, not the patent drawing; my drawings were made before the machine. The patent drawings were made from my drawings, not from the machine.

Q. Where is the machine that your drawings were made from that formed the substance of the originals for the patent?

A. That machine has probably disappeared by now; I don't know what has happened to it.

Q. Have you any machine just exactly like that in your store?

A. I haven't in my possession.

Q. Didn't you say this morning on your cross-examination that you had one there that had been disassembled?

A. Well, it must have been disassembled; I don't know where it is.

Q. You don't know where that is? Now, referring to your patented machine, which unfortunately is not available at the present time, merely shown in the Patent Office drawing, could you use roll cellophane on that for making a bag?

A. I could place in the roll, but I later developed on it—I could put the roll on the same as the machine that is here now, yes.

Q. Well, without the later development?

A. Could I use the roll? [117]

Q. Yes. A. No.

Q. You could not use a roll of cellophane to make a bag? A. No.

(Testimony of Rene Gaubert.)

Q. On your original machine?

A. No, unless I cut the sheet by hand.

Mr. Schapp: That is all.

Mr. Flehr: That is all.

CHARLES SCHULTZ,

called by the Plaintiff; sworn.

The Clerk: Will you state your name?

A. My name is Charles F. Schultz.

Mr. Flehr: Q. Are you the Charles Schultz who is named as a defendant in this case?

A. I am a defendant, yes, sir.

Mr. Flehr: Your Honor, this witness, of course, is being called under Rule 43, Section B.

Q. Now, Mr. Schultz, you purchased one of the Simplex machines corresponding generally to Plaintiff's Exhibit No. 4 from the plaintiff?

A. Yes, sir, I purchased one of the machines without the feed roll.

Q. Speak a little louder so I can hear you. Help the reporter; he has to get it down.

Can you tell me approximately when you made that purchase?

A. Somewhere in 1935, the latter part.

Q. What did you use the machine for?

A. Making cellophane bags.

Q. What did you use the bags for?

A. The packaging of cereal.

(Testimony of Charles Schultz.)

Q. Were you manufacturing cereal at that time?

A. I was, yes.

Q. What type? A. Breakfast cereal.

Q. What kind of bags were you using before you purchased this machine?

A. We were making the bags ourselves. [118]

Q. Out of what? A. Around a form.

The Court: Q. Around a form?

A. That will be brought out later, I believe the exact way we were making bags. We were already making bags, ourselves, before we purchased the Gaubert machine.

Q. What type of bag?

A. Out of cellophane.

Q. Moisture-proof cellophane? A. Yes.

Q. How did you seal the bags?

A. We heat-sealed it.

Q. You say you purchased the Gaubert machine and started to use it in your establishment?

A. Yes, sir, we used the Gaubert machine.

Q. That is, you stopped making bags by hand?

A. We did stop making by hand, yes.

Q. You used those bags to market your product?

A. Yes, sir, to package the cereal.

Q. What was that puffed wheat?

A. It was puffed wheat and other products.

Q. Was the machine successful?

A. The machine was altogether too slow. As far as making the bags, it made bags. It was very, very slow.

(Testimony of Charles Schultz.)

Q. How many bags did it make per hour?

A. Up around 500 bags an hour, depending somewhat on the operator.

Q. Was that a great deal better than making the bags by hand?

A. It was somewhat better, yes, sir.

Q. You later bought a second machine of the same type? A. Yes, sir, we did.

Q. What time?

A. I don't remember the exact date; approximately six months after the first purchase, as I remember it.

The Court: Q. Pardon me; the same type of machine?

A. The same type of machine, yes, sir. [119]

Q. From the same firm?

A. From the same Mr. Gaubert, yes, sir.

Mr. Flehr: That is according to Plaintiff's Exhibit No. 4.

The Court: The last machine there?

A. Well, I believe the sheeting attachment was put on the machine after we purchased it.

Q. How about the machine?

A. It corresponded generally to this machine that is shown here.

Mr. Flehr: Q. Will you point out on this Exhibit 4 what was added to the machine after you bought it?

A. Can you see, your Honor?

(Testimony of Charles Schultz.)

The Court: I can see.

A. The original machine—this was the top. This mechanism that I am indicating with my hand was added later to the machine to accommodate a roll of cellophane and facilitate in sheeting the rolling. The original machine had no place to hold a roll of cellophane. We had a separate machine for sheeting the cellophane to size, and the sheets were placed as he showed you this morning under the mandrel and the foot depressed, and the machine went one single revolution and made a bag semi-automatic.

Mr. Flehr: Q. How many bags per hour did the machine make after the roll attachment was placed upon it?

A. The roll attachment did not change the speed of the machine in any respect; it still made around 500 bags an hour, depending somewhat on the operator.

Q. By “operator” you mean what type of person, a girl?

A. We changed operators approximately every two hours, because it was extremely hard work to sit there and feed sheets out at a distance away from the body.

Q. You had two operators? A. Yes, sir.

Q. And do I understand you that this roll attachment was placed only on the second machine you bought?

A. Yes, sir, only one [120] attachment, as I remember it.

(Testimony of Charles Schultz.)

Q. You don't know about the first machine?

A. I know the first machine was purchased without a roll attachment and I do not believe we ever put the attachment on that.

Q. But you say about six months after you bought the first machine you bought the second machine of the same kind, and then at a later date a roll attachment was added to that machine substantially as shown in Plaintiff's Exhibit No. 4?

A. Yes, sir.

The Court: Q. You bought it from the Plaintiff, here? A. Bought it from the plaintiff.

Q. And the attachment also?

A. Also the attachment, yes.

The Court: Proceed.

Mr. Flehr: Q. How long did you use those two machine after you purchased the second machine?

A. We used those machines until we had developed our own machine, which was approximately a year and a half.

Q. Do you mean a year and a half from the present date, or do you mean a year and a half—

A. A year and a half from the date we purchased the machine.

Q. You mean that you used the two machines about a year and a half after you purchased the second one?

A. Well, I am not exactly clear on the dates. That would only make a matter of six months difference one way or the other.

(Testimony of Charles Schultz.)

Q. So you used both machines well over a year, is that right?

A. We will say over a year for each machine, yes.

Q. And during that time you made all of your cellophane bags on those two machines—all that you required?

A. By running two shifts of girls on the machine we were able to keep up with our requirements at that time.

Q. Did your requirements get so heavy that you couldn't manufacture [121] enough bags on those two machines?

A. Yes, sir; our requirements came to the point where we couldn't conveniently manufacture them on these two machines.

Q. At that time were you selling bags to other people?

A. Not as a business. We did accommodate a few people by selling them bags.

Q. At the time you were using Mr. Gaubert's machine? A. Yes, sir.

Q. Then after your bag requirements became so severe, so heavy, you then made your own machine for that purpose; is that right? A. Yes, sir.

Q. What did you do with the two machines that you purchased from Mr. Gaubert?

A. We sold them.

Q. To whom?

(Testimony of Charles Schultz.)

A. One to Oest Foods, in San Francisco, and one to H. & W. Honey Products.

Q. Off-hand, do you recall how much you got for them?

A. One machine was sold with some other property, and I do not remember what the valuation was on the machine. The other machine I believe around \$200 or \$175.

Q. When did you say you made your machine?

A. What do you mean by "made"? Do you mean finish the machine, or start?

Q. No, when did you complete it?

A. We completed our machine in 1936, the last part.

Q. Did you start to use it immediately?

A. We did, yes, sir.

Q. In your own establishment?

A. In our own establishment.

Q. When did you commence the sale of that machine? A. We made the first sale in 1937.

Q. To whom?

A. Koster Candy Company, Oakland.

Q. In 1937? A. The last part.

Q. Will you please——

A. Just a minute; let me check that date; I may be wrong on that. [122]

Q. I will ask you if you haven't records on that first sale.

A. It was '38 instead of '37. I have records if I could look them up. Change it to '38 instead of '37.

(Testimony of Charles Schultz.)

Q. Does that apply to all your testimony with respect to the new machine?

A. I believe some of these dates I haven't fixed permanently unless I look them up on the records.

Q. Don't misunderstand me. Does that 1938 date apply also to the development of your automatic machine?

A. I don't follow you.

Q. You have previously testified that you first developed your automatic machine in 1937.

A. Yes.

Q. Do you wish to change that also to 1938?

A. No; we made the first sale in 1938.

Q. When did you develop it?

A. We had previously used the machine in our own plant for over a year before we made a sale.

Q. And you have records of the first sale to the Koster Candy Company?

A. I have, yes, sir.

Q. Would you please produce such records?

A. I haven't those records with me.

Q. Will you check your files and produce them?

A. I can produce them, yes, sir.

Q. Now, this machine on the floor, here, Mr. Schultz, is that the machine which you say you manufactured?

A. That machine is a machine from which the patent drawings—patent application drawings were made. That was our original machine.

Mr. Schapp: Can we bring this over?

(Testimony of Charles Schultz.)

The Court: You can leave it there. We will go and see the machine after warming it up. Go down and warm your machine up and we will see that operate.

Mr. Flehr: Of course, I am not asking him to demonstrate at the present time, but just simply a few questions I want to get [123] clear before I proceed with my case.

The Court: All right.

Mr. Flehr: Mr. Schapp, do you wish to introduce that machine as your exhibit now?

Mr. Schapp: Well, if you want it.

Mr. Flehr: I will put it in as my exhibit if you don't want to.

Mr. Schapp: If your Honor please, I planned to introduce it as an exhibit, and I might ask your Honor's permission to withdraw the exhibit after the trial is over, because the machine I understand is being used by our clients every day.

The Court: I don't think we will have any difficulty on that score.

Mr. Flehr: I think we can arrange it. I have the same problem.

The Court: We don't want these machines that are throwing people out of employment to remain here idle.

Mr. Flehr: Would you introduce your machine in evidence?

Mr. Schapp: Yes, you might call it Defendants' Exhibit A.

(Testimony of Charles Schultz.)

(The machine referred to was marked "Defendants' Exhibit A.")

Mr. Flehr: That will be the machine manufactured and sold and used by the defendant—that is the Defendant Schultz Food Company, and which is charged here to be an infringement of the patent in suit.

The Court: So stipulated?

Mr. Schapp: Yes.

Mr. Flehr: And it is also the machine which is being used by the defendant Koster Candy Company.

Mr. Schapp: Q. That is the same machine, isn't it? A. It is, basically, yes. [124]

Mr. Schapp: So stipulated.

Mr. Flehr: Q. You say you made a sale to the Koster Candy Company sometime in 1938?

A. Yes, sir.

Q. Have you sold additional machines since that time? A. We have, yes, sir.

Q. How long after the first sale did you make the second sale?

A. Approximately two weeks.

Q. Could you tell me how many machines you have sold up to date?

A. We have sold four machines.

Q. Are you thoroughly familiar with the operation of Defendants' Exhibit A?

A. I am, yes, sir.

(Testimony of Charles Schultz.)

Q. You are also familiar with the construction of all the details of the machine?

A. Of our machine, yes, sir.

Q. Now, I would like for you to tell me what is the detailed construction of the heater of this Defendants' Exhibit A? Can you give me those details?

A. I can show them to you; I don't know exactly what you want by—how you want me to explain it. We have two heated surfaces, one at right angles with the other.

Q. I understand.

A. If you will come over here I can show you.

(The Court, Counsel and Witness going over to the exhibit.)

Q. Now, Mr. Schultz, on this heater, as appears here, there is a backing or mounting; that is correct, isn't it?

A. There is a mounting.

Q. Made of rigid material, cast iron?

A. Yes, sir.

Q. And also there is a lower part which is the part which is heated, is that right?

A. The lower part that carries the heating surface, yes, sir.

Q. That has an electrical heating element in it, has it not?

A. Yes, sir.

Q. That lower part is attached to the upper part, is it not, by [125] some form of attaching means in between?

A. Yes, sir.

Q. Now, Mr. Schultz, on this particular machine, Defendants' Exhibit A, I see two bolts for attaching

(Testimony of Charles Schultz.)

it. Are they the only attaching means between those parts? A. They are, yes, sir.

Q. Have you springs between those parts?

A. We have springs urging the heated surface down, just so the heater will go down——

The Court: I don't follow that. What do you mean by that?

A. Your Honor, if I raise this up, there is two bolts——

The Court: I see.

A. (Continuing)—holding this heater from leaving the backing entirely, and there are springs spaced at intervals, between six and eight, urging it away from this member, this back.

Q. What is the purpose of that?

A. So that when pressure is applied down here the heating surfaces can align themselves with the part to be heated.

Q. More heating down on that end?

A. No, it will——

Q. Uniform heat?

A. (Continuing) —allow uniform pressure. I believe in the other machine there are three supports; there are no springs.

Mr. Flehr: Q. That is what I wanted to get at, Mr. Schultz. You spoke of another machine. What other machine do you have reference to?

A. I am speaking of Mr. Gaubert's machine.

Q. Now, you recall when I examined or inspected one of your machines at your establishment about a month ago? A. I do, yes.

(Testimony of Charles Schultz.)

Q. Do you recall that that machine had three points of attachment between this back portion and the front heater portion? A. It has, yes, sir.

Q. That was a machine which we photographed, was it not, as being the machine involved in this case? A. I think it was.

Q. Have you one of those heaters in your establishment? [126] A. I believe so.

Q. Will you bring one, please? A. Yes, sir.

Q. Now there is another matter about this machine I wanted to ask you. You say you are thoroughly familiar with its mode of operation?

A. I am, yes, sir.

Q. This part that I am pointing to, is that a mandrel?

A. Not as shown by the other machine.

Q. But it has a plate about which the paper or the cellophane is folded before the heating operation, has it not?

A. It is folded through—I want to point out at this point that our material takes a fold of 90 degrees before it reaches the blade.

Q. I understand; folded 90 degrees—where is the 90 degrees?

A. The 90 degrees is right here. It is half way folded between that point and here.

Q. 90 degrees is right angles.

A. This stands up here. In the operation of the machine this did not stand up.

(Testimony of Charles Schultz.)

Q. In other words, you want to point out that it is folded across back here in back?

A. Part of the folding occurs before the material reaches the plate and part of the folding after it reaches what we call the plate.

Q. That is because the paper is at an angle with respect to the plate? A. Yes, sir.

Q. And the paper is tightened by these rollers, is it not? A. Yes, sir.

Q. What are these little devices, Mr. Schultz? I am pointing to this little wire——

A. Those devices are used in making the square type of bag.

Q. This little finger that I am pointing to, is that identical with the one that I inspected at your establishment about a month ago?

A. Yes, sir. [127]

Q. Identical? A. Yes, sir.

Q. Are you positive?

The Court: Don't shake your head; you will have to answer, for the purpose of the record.

A. Yes, sir. I'm sorry.

Mr. Flehr: Q. As I said a moment ago, this part that I am pointing to is the plate about which the cellophane is placed preparatory for the sealing operation; is that not true?

A. If I followed you correctly, it is true, yes.

Q. Tell me, Mr. Schultz, does that plate move during the operation of the machine?

(Testimony of Charles Schultz.)

A. No, sir.

Q. It does not move?

A. It does not move. It must be held rigid.

Q. It is absolutely fixed?

A. Absolutely fixed.

Q. You are absolutely positive?

A. Positive. The casting has been broken three times in trying to fix the plate so it wouldn't move.

Q. Mr. Schultz, the machine that I examined at your establishment did it not have a handle on this pivot point that I am pointing to which is near the back side of the machine, near the end of the plate over which the cellophane is wrapped?

A. That is right; that handle is to facilitate putting on the plate without the use of a wrench.

Q. This attachment that you have here, is that rigid or not rigid? A. That is rigid.

The Court: That is rigid; it is bolted down.

A. We had trouble with that point working loose, and the operators kept tightening it down and they would break the casting. Therefore we changed the point slightly since this machine was made.

Mr. Flehr: Q. And since I examined the machine? [128]

A. This machine has never been changed. This machine was in the shop all the time, and you examined two different machines at different times. Those parts have been changed now on the newer machines.

(Testimony of Charles Schultze.)

Q. Could you bring the new parts in, please, so we can see them?

A. It is possible that I can, yes.

Q. I wish you would, please. Do I understand on this machine that that part that I am pointing to, that point of attachment, this long plate, with the bracket comes down near the end of the machine, that that is a rigid connection and not a pivot?

A. If that pivots in that place the machine will not operate.

Q. What keeps it from pivoting?

A. Because it is locked. This is tightened with a wrench and locks that. If that point swivels the plate will bend in this point approximately six inches.

The Court: If the point swivels—what do you mean by that?

A. If this point should work loose and swivel, the movement of the cellophane and the drag on the plate will cause the plate to buckle, to bend similar to that, and the material will not follow. This has to be locked tight at that point, there.

Mr. Flehr: Q. As you handled it, you did move it, didn't you, Mr. Schultze?

A. I can move it, yes.

The Court: Yes.

The Witness: It is not intended to move, and it must be locked in the operation.

The Court: What is this—sheet iron?

(Testimony of Charles Schultz.)

A. That is galvanized sheet iron.

Mr. Flehr: Q. This plate is resilient, is it not, Mr. Schultz—the plate over which the cellophane revolves?

A. Generally, but not in the operation of the machine it isn't.

Q. Now, suppose we raise this heater. Will you please do that? [129]

A. (The witness did as requested.)

Q. I call your attention to the contact bar that you have on the long legs of the heater. I will turn the machine around so your Honor can see that.

The Court: I see it.

Mr. Flehr: I'm afraid you can't from that angle. I am pointing to this bar, here. (indicating)

The Court: Yes.

Mr. Flehr: Q. I notice that that bar, as you have it, is not more than one-half the length of the long bar of the heater; is that correct?

A. That is right, yes.

Q. Can you make full-sized bags with the heater arranged in that fashion?

A. I don't know what you mean by full-sized. The heater—the heated strip, heated surface—this particular heater, which we call the longitudinal heater, represents the full length of the bag. If we choose to make a 16-inch bag we place a strip—a heated surface in here that is 16 inches long. This one I believe, for this wide plate, this one is approximately 8½ inches long.

(Testimony of Charles Schultz.)

Q. Now, Mr. Schultz, could this heater with a short bar of that kind be used in the Gaubert machine? A. In no respect, no.

Q. You are absolutely sure of that?

A. Absolutely sure.

Mr. Flehr: That is all.

Mr. Schapp: That is all.

The Court: You might as well make some while you are down here.

The Witness: Would you like to have us demonstrate that machine?

Mr. Flehr: Do you wish to make him your witness for that purpose now? Just let him see the machine operate. [130]

The Court: Go ahead.

Mr. Flehr: I didn't know whether he was still my witness or not, your Honor, but it doesn't matter.

The Witness: I have to turn this machine to the reverse side so you can watch the movement. I want to call your attention to the feed roll, the tightener to keep the web tight at all times after the intermittent operation of the machine. The material strikes the plate here and forms at about 90 degrees, here, and then by the urge of these wheels tends to draw the material tightly about this forming plate. This is just gravity of this laying on the material to facilitate in making it lie flat on the plate. The heating——

The Court: Marshal, turn on the power.

(Testimony of Charles Schultz.)

The Witness: It hasn't heat enough.

The Court: We will wait until there is. I want to see how it compares.

Q. Does that make up to a 16-inch bag here?

A. Yes.

Q. Beyond that you couldn't go? A. No.

The Court: What about the other machine, counsel?

Mr. Flehr: About the same, your Honor.

Is that correct, Mr. Gaubert?

Mr. Gaubert: My machine will go higher than that. As a matter of fact, it will go up to 20 inches now.

The Court: You can reduce it to any size?

Mr. Gaubert: Yes, sir.

The Witness: The machine I purchased from Mr. Gaubert wouldn't make a 20-inch bag.

The Court: Both of you have attempted to improve the machines.

The Witness: Are you speaking of your new machine?

Mr. Gaubert: I am speaking of the new machine.

[131]

The Court: That is what I meant.

Mr. Gaubert: That is what I thought you meant, your Honor.

The Witness: There is a little water here.

The Court: Don't get uneasy about it. I want to see this machine, how it operates.

(Testimony of Charles Schultz.)

The Witness: If I may explain, I have a crank on here that I can turn fast or slow.

Mr. Schapp: The motor on this machine will not operate on the current available here.

The Court: Why is that?

Mr. Schapp: Because it is direct current, and this is an alternating current motor, and we have to turn it by hand.

The Court: How is it they operated their machine?

A. They have added an additional motor and bolted it on a block with which to accommodate the direct current. Neither of the machines will operate on the current—neither their machine nor ours, on the current available here.

The Court: I have had the same difficulty; I know that that is true. We had a disastrous experience here in one of those other patent cases.

The Witness: Will you turn the machine as near as you can to the speed that the motor turns at when it gets heat enough?

(The machine was thereupon demonstrated.)

The Court: Turn them out as fast as they will go.

(The machine was again demonstrated.)

The Court: All right. It may be that this machine was made for this purpose—that is, for demonstration purposes, but it has done better than I thought it would.

(Testimony of Charles Schultz.)

The Witness: We had to take the machine almost apart to get it up the elevator this morning. [132]

Mr. Flehr: Just a minute. There is one other witness——

The Witness: This seal is not in line—not directly in line. The seal is over, and the over-lap here is to one side of the seal.

Mr. Flehr: What caused that, Mr. Schultz?

A. Because we had to take this roll—this whole attachment off, your Honor, to bring it up in the elevator. The roll has to be adjusted.

The Court: He didn't come as well prepared with his motors; probably that would be the answer.

Mr. Gaubert: I knew about the current up here.

Mr. Flehr: Any questions, Mr. Schapp?

Mr. Schapp: No, not at the present time.

ARTHUR J. KERCHER,

called for the Plaintiff; sworn.

The Clerk: Will you state your name?

A. Arthur Jerome Kercher.

Direct Examination

Mr. Flehr: Q. Mr. Kercher, what has been your experience in connection with mechanical devices and engineering experience?

A. Well, I have been—my experience has started when I was a very young fellow. I designed my

(Testimony of Arthur Kercher.)

first machine approximately in 1894 or '5, and at that time I designed a machine to fold letters, fold envelopes around them, seal them, put stamps on them, and count them, and tie them up in packages for shipment from the Stock Exchange in Chicago. Since that time I have developed more than one hundred inventions, the first invention for a brush holder on an electric generator I applied for in 1898. I was graduated from high school in St. Cloud, Minnesota. I went for a short time to the University of Minnesota, and I [133] gained a good deal of experience in the construction business in the building of electric plants—at that time called electric light stations, and constructed five or six of them on the lines of the Northern Pacific Railway through Minnesota and Montana. Afterward for a number of years I was connected with the electrical industry in the development of bank protection apparatus, burglar alarms, burglary protection for buildings and retail establishments. Afterward I came to California and constructed electric plants in Northern California.

The Court: Q. What year?

A. This was in 1904 and '5. At that time I became interested in the electric heating business by reason of the fact that I had considerable electrical energy at my disposal, and up until the first World War I was actively engaged in designing and producing electric cooking apparatus, much of it automatic. During the World War I was super-

(Testimony of Arthur Kercher.)

intendent of a plant primarily producing nitro glycerine for the Allies, and in that connection I was conversant with wrapping machines which were used to wrap bars of soap and allied products. After that I continued my business on electric heating, and am now associated with a company in San Francisco producing electrical heating apparatus.

Q. What company is that?

A. The Wesix Electric Heater Company.

Q. That is the electric heater——

A. That is the heater that is advertised by the Pacific Gas & Electric Company, and by dealers all over the country.

Q. It is the leader in that field, isn't it?

A. That is from the standpoint of sales.

Q. Who is your competitor in that article?

A. Our competitors are very few. We have a few of them, because most of them yet do not believe in electric heat. We have competitors recently [134] in this business of heating water.

Q. What is the name of that?

A. That is the Wesix Electric Heater.

Q. They have been manufacturing those for fifteen to twenty years?

A. We have been manufacturing them for upwards of twenty years in San Francisco.

The Court: Proceed.

The Witness: That, I think, is sufficient.

(Testimony of Arthur Kercher.)

Mr. Flehr: Q. Mr. Kercher, are you familiar with the patent in suit? A. I am.

Q. And you have made a study of the disclosure of the patent in suit? A. I have.

Q. And also a study of the claims?

A. I have.

Q. Are you generally familiar with the interpretation of patents and the interpretation of patent claims? A. I am.

Q. You have had experience along that line?

A. Yes, sir.

Q. And, Mr. Kercher, have you studied these machines in evidence here, particularly Plaintiff's Exhibit 4, Plaintiff's Exhibit 6, and Defendants' Exhibit A? A. I have.

Q. Have you seen all of those machines operate and studied their operation? A. I have.

Q. You have studied their construction?

A. I have.

Q. I wish you would take this patent in suit, Plaintiff's Exhibit No. 1, and just describe briefly what were the prime objects of the invention set forth in that patent.

A. According to the patent, on page 1, lines 4 to 25—I will read the objects:

“It is an object of the invention to provide a machine and method of the above character which will dispense with the conventional practice of gluing together the overlapping edges of sheet material after the sheet is folded to form the bag.

(Testimony of Arthur Kercher.)

In this connection the present invention employs moisture-proof [135] 'Cellophane', which makes possible a seal between overlapping portions by the application of heat and pressure.

"Another object of the invention is to provide a machine of the above character which will not be unduly expensive with respect to first cost and maintenance, and which can therefore be used by department stores, mail order houses, bakeries, and the like, to form simple types of bags directly from 'Cellophane' stock. Up to the present time it has been customary for such establishments to purchase 'Cellophane' bags made by bag manufacturers, at a relatively high cost. My machine, because of its low cost and ease of operation, will make possible the manufacture of bags as they are required by such establishments, at a considerable saving."

Q. Now, Mr. Kercher, without going too much into detail, could you give us a general description of the machine disclosed in this patent?

A. Without going into details, the machine consists of a working table, a plate called a mandrel, which is placed above the table, the plate being movable in a vertical direction with regard to the table. It has a device which operates in an operating cycle to form a sheet material which is placed under the mandrel between the mandrel and the table, over the upper surface of the mandrel; a device which is called a retaining bar which will permit a fold to be made on one end of the mandrel and

(Testimony of Arthur Kercher.)

which is produced by a device which pushes it forward, the bottom end of the bag over the top of the mandrel. There is also a means for sealing both the longitudinal and the bottom seam simultaneously by moving down onto the top of the mandrel a heater which is in the shape of a T, and sealing them simultaneously.

Q. Now, will you describe generally, without going too much into [136] detail the method disclosed in the patent?

A. The method in forming a cellophane bag is characterized by using a plate-like mandrel or form which is shaped nearly like the desired contour of the bag, and after it is placed there it is successively folded over the sides of the bag through substantially 180 degrees; that is, it is folded right on top of the mandrel.

Q. By 180 degrees, you mean to make a complete movement of the margin?

A. A complete fold of the margin over, above and on top of the mandrel. A means for folding the projecting part of that sheet fold over the mandrel, over the end of the mandrel, and then applying heat and pressure to the top of it, sealing both the longitudinal and the bottom seams simultaneously.

Q. Now, Mr. Kercher, will you please, if you can, identify this drawing that I am handing to you?

(Testimony of Arthur Kercher.)

A. This is a drawing—this drawing that you have handed me is a drawing that was shown to me several days ago, embodying the invention as claimed in the patent, and it is a drawing of the operative part of the machine which is called the Schultz machine, I believe.

Q. Defendants' Exhibit B?

A. Defendants' Exhibit A.

Mr. Flehr: "A"; pardon me. Mr. Schapp, do you stipulate that this drawing just identified by the witness is the drawing made of the Schultz machine pursuant to the order of this Court to compel you to permit the examination of this machine—to permit the plaintiff to examine this machine and to make accurate copies of the same?

Mr. Schapp: Your Honor, I did not study over the detail of that drawing. If it is testified to that extent, I don't think it need be stipulated.

Mr. Flehr: You have had the drawing for several days, Mr. Schapp. [137]

Mr. Schapp: If you say so, it probably is.

Mr. Flehr: I suggest this: You examine the drawing, Mr. Schapp, and let me know if anything is in error.

Mr. Schapp: I will.

The Court: It will be admitted next in order.

Mr. Flehr: I offer in evidence the drawing identified by the witness.

The Court: Subject to any corrections you want to make.

(Testimony of Arthur Kercher.)

Mr. Flehr: As being a drawing of the Schultz machine, Defendants' Exhibit A.

(The drawing referred to was marked "Plaintiff's Exhibit 11" in evidence.)

Mr. Flehr: I think I might also add, your Honor, that in view of the order, certain portions of the machine have been deleted from the drawing. That was because Mr. Schapp stated before this Court that he did not think certain portions of this machine were pertinent to the issue, if you recall, particularly the means for feeding the paper into the machine and the means for discharging the bags from the machine, and the knife mechanism for cutting off the bags.

Q. Now, Mr. Kercher, I would like for you to make certain comparisons or contrasts between Plaintiff's Exhibit 4 and the Schultz machine, Defendants' Exhibit A, and I think we should get these machines together, if we can. Now, Mr. Kercher, this part that I am referring to, I believe you call that a mandrel?

A. It is essentially a mandrel, yes.

Q. Just point out briefly where that part is shown in the drawing of the patent in suit?

A. On the first page in Fig. No. 2 it is illustrated by the figure No. 36.

Q. And what is the function of that mandrel, briefly? [138]

A. The function of the mandrel is to provide a surface—a solid surface over which the sides and the ends of the bag to be can be folded.

(Testimony of Arthur Kercher.)

Q. Do you find any part of the Defendants' Exhibit A which corresponds to such a mandrel?

A. I do. In Defendants' Exhibit A the long bar supported above the bed or table of the machine is arranged for the same purpose of folding about it the bag that is to be formed by the machine.

Q. Would you please point out that part, Mr. Kercher?

A. This plate-like mandrel that is fastened at this end of the machine and extends over the table of the machine is put there for the purpose of folding over the sides and ends of the bag.

Q. This mandrel on the Gaubert machine, Plaintiff's Exhibit 4; is that movable?

A. That is movable up and down in a vertical position relative to the machine.

Q. What is the purpose of the movement?

A. To facilitate the moving of cellophane under the mandrel, either placing it in there or moving it under.

Q. On Defendants' Exhibit A, is that mandrel movable? A. It is movable.

Q. In what respect is it movable?

A. The mandrel, while being supported on one end, is flexible at the other end; it is of considerable length, and considerable movement can take place on the end over which the bottom of the bag is folded, permitting the cellophane or the material to be used in the bag to move underneath the mandrel, between that and the table or the device upon which the bag is made.

(Testimony of Arthur Kercher.)

Q. Can you point out directly on this machine how that mandrel is movable?

A. This mandrel can be moved in a vertical position [139] by reason of the resiliency of the plate, itself.

Q. You mean the resiliency of the plate?

A. Of the plate, itself as it is fastened to the machine.

Q. Would you show the court how that is resilient, Mr. Kercher?

A. In effect, this device being flexible here, acts as a hinge, and it can move up and down like that (illustrating). In other words, the end of this mandrel can be moved in a vertical plane relative to the body of this machine.

Q. Now, have you ever seen this machine, Defendants' Exhibit A, operated at normal speed with a motor?

A. I have.

Q. Have you observed the machine closely to find out if the mandrel does move during the operation of the machine?

A. I have.

Q. Does it move?

A. It does. I have had real evidence that it moves.

The Court: Let us assume that it does. What is that the answer to?

Mr. Flehr: That is one of the defenses here; they contend, as stated in the opening statement, that their mandrel is fixed and does not move. We wanted to show that their mandrel did move in

(Testimony of Arthur Kercher.)

operation. Mr. Schultz verified that on oath that the mandrel did not move during operation. It is one of the things that they are trying to rely upon.

The Court: Did it move while it was operated over there?

Mr. Flehr: Yes, your Honor.

The Court: In what respect?

Mr. Flehr: I can show you.

The Court: Only because it is sheet iron; isn't that true?

Mr. Flehr: It had a very appreciable vertical movement. It wasn't so apparent because the machine was being turned over by [140] hand.

The Court: In any event it shot through even assuming that it moved.

Mr. Flehr: It must move to operate properly.

The Court: Assume that it does move; then what is the answer?

Mr. Flehr: We are simply showing the equivalency of those parts. They contended the parts were not equivalent because their part did not move.

The Court: All right; I just wanted to follow the testimony.

Mr. Flehr: Q. Now, Mr. Kercher, would you point out the mechanism on this Plaintiff's Exhibit 4 which folds over the side margins of the sheet?

A. In Plaintiff's Exhibit No. 4 the machine is so designed that plates—after the mandrel has been

(Testimony of Arthur Kercher.)

lowered upon the material between—on top of the plate side, the plates are successively pushed over the top of the mandrel, folding the cellophane over the top of the mandrel.

Q. Now, do you find anything in this Defendants' Exhibit A corresponding to those folding elements?

A. Yes. In Defendants' Exhibit A we find a device which is substantially equal in effect; that is produced by bringing the cellophane over the end of the mandrel at such an angle that the sides are folded successively, one side under the other side, over the top of the mandrel, so that the longitudinal seam can be sealed in one operation.

Q. Now, would you just briefly point out where you find such folding means illustrated in the patent in suit? Point it out in connection with the drawing.

A. It is indicated here in the drawing in Fig. 6 that the plates marked 28 will move over the top of the mandrel causing the sides to be folded over the top of the mandrel.

The Court: Figure what? [141]

The Witness: In Fig. 6. Pardon me, I see the plates there are in this case 44a and 44b.

The Court: 44a and 44b. Point them out on the machine.

A. They are the little plates in the operation of the machine. Your Honor, the mandrel comes

(Testimony of Arthur Kercher.)

down, the cellophane laying over the plate on the top; these plates on the side here——

The Court: Yes.

The Witness (Continuing): —over the top of the mandrel move out folding the cellophane over the top of the plate, one moving in after the other. That is in effect the same as the folding means that they have on the end of that mandrel. In other words——

The Court: The same? In what respect is it the same?

A. In that the cellophane is folded over the top surface of the mandrel. This means of folding it produces the identical effect that the other means has that is arranged on the end of the mandrel, whereas these move over the side of the mandrel.

The Court: Yes, but what similarity is there between the two?

A. It would be perfectly feasible to arrange this roll of paper in such a way that this sheet could be brought in here on this machine, which is Exhibit A, the Defendant's machine, and the folding device on this machine could be put on here to accomplish the same purpose that that does.

The Court: All right; granting that is true, what is the similarity of those two operations?

A. The similarity is that they fold——

Q. The result is the same?

(Testimony of Arthur Kercher.)

A. They fold the cellophane over the top of the mandrel.

Q. In one the fold there is without any slots in the operation; the other folds itself on account of the position of the roll and [142] the way it is fitted into that machine; is that true?

A. That is the idea.

Q. And at an angle. What similarity is there between those two?

A. The similarity is that when we read the patent claim, the patent claim does not indicate that this has to be this kind of a device; it provides means for folding the cellophane over the top of the mandrel.

The Court: That is all right.

A. Regardless of what kind of a method we use, the means which are essential perform essentially that same function.

The Court: Q. You get the result by different means? A. Yes.

Q. Then the question is, what is the similarity in the means? Only the position of the paper and the diagonal position over which it goes down, is that true? A. That is true.

The Court: All right. That is all. Pardon me for interrupting counsel.

Mr. Flehr: Q. Now, Mr. Kercher, will you point out the mechanism in this Plaintiff's Exhibit 4 for folding over the end of the cellophane over

(Testimony of Arthur Kercher.)

the end of the mandrel to which you previously referred?

A. In this machine, and in the patent, two elements are provided. In the first place, a fold retaining means, which is the part that I am pointing to here in Plaintiff's Exhibit No. 3—

Q. 4.

A. —No. 4, these retaining means are moved in the cycle of operation back and forth over the top of the mandrel and over the top of the folded sheet of cellophane so that it will provide a—it will provide a line so that the folding means on the end of the mandrel can successively raise up and fold over the end fold under the heater of the machine. You see as the machine operates now the sides are folded over the mandrel; in this case it is coming off (illustrating). We will [143] start the cycle again. Now you will notice that these fold retaining means are coming in over the top of the sheet that has been folded over the top of the mandrel. Next an end folding device arranged so that it moves up and over the end of the mandrel, folds the bottom of the bag over the fold retaining means, and holding it there until the heater comes down to the proper place and presses down and seals the bag. That is essentially the operation.

Q. You just referred to fold retaining means and to end folding means. Would you point out those parts as shown in the machine?

(Testimony of Arthur Kercher.)

A. The fold line retaining means are marked by the number 62a and 62b in what is Fig. 3 of the patent. The folding means is a device located adjacent to the end of the mandrel and is a plate marked 74 that is actuated by a device which brings the bag up and over the end of the mandrel.

Q. Now, on this Defendants' Exhibit A do you find anything in that machine corresponding to the end fold line retaining means?

A. In Defendants' Exhibit A a bar arranged near the end of the mandrel and laid across the top of the mandrel is so placed that during the cycle of operation of the machine it moves forward and back into a line adjacent to the end of the mandrel over which the end of the bag to be made is folded.

The Court: Operate that now. Cut one of those.

(The witness operated the machine.)

The Court: Where is the similarity? Now point out the similarity.

A. In this device—in the device in the patent, instead of having a solid bar that moves longitudinally back and forth over the surface of the bag which is being made on the mandrel, the Schultz machine has a bar laid across the top of the bag, and this bar, instead of moving away from the center of the [144] mandrel moves longitudinally along the mandrel, providing a space for the heater to come down and seal the bottom of the

(Testimony of Arthur Kercher.)

bag and the side of the bag occupied by the fold retaining means when it is in the position when it is folded. The fold retaining means instead of sliding from the sides of the bag are moved to a position from the open end of the bag and thus providing—moving away from the position over which the bottom of the bag is sealed.

The Court: Q. It isn't sealed on the lower seam at all? A. On the top seam.

Q. Both of them are alike in that respect?

A. Both of them are identical in that respect.

Mr. Flehr: Q. Will you point out that fold line retaining means on the Gaubert machine?

A. (The witness indicated.)

Q. I suggest that you put a piece of paper in there.

A. This fold line retaining means comes in from the side; the end of the bag is folded over that fold line retaining means.

Mr. Gaubert: I am backing the machine up to show that.

The Witness: They move away while this holds the fold down and the heater comes down and seals it.

Mr. Flehr: Do you wish to see that demonstrated any more, your Honor?

The Court: No, I think I can follow it generally.

Mr. Flehr: Q. Now, Mr. Kercher, with respect to the heater upon this Defendants' Exhibit 4, I

(Testimony of Arthur Kercher.)

believe you have already described that as being a T-shaped heater. A. Yes.

Q. Would you please just give us a further description of that heater?

A. The heater on Plaintiff's Exhibit No. 4 is a T-shaped heater comprising a T-shaped supporting back which is [145] connected with the mechanism under the machine to move it up and down in a vertical direction. Underneath that is a heating element or heater, in this case heated by electricity, which is supported at different points so that a fairly uniform pressure will be applied to the surface of the mandrel.

The Court: Pressure or heat, or both?

A. Pressure and heat—which pressure and heat are applied to the top surface of the bag on the mandrel.

Mr. Flehr: Q. Can you state any particular advantages for that type of heater?

A. The advantages of that particular shape are that it will simultaneously seal the longitudinal and the bottom seams on the bag.

Q. Briefly, will you point out where that heater is shown in the patent in suit?

A. The heater in Fig. 1 is identified by the figure 96, and that part 96 is fastened to the point or the heater support 94, which is connected with the operating mechanism of the machine.

Q. Now, I understand that this heater on Plaintiff's Exhibit No. 4 has a continuous lower T-shaped

(Testimony of Arthur Kercher.)

area which is pressed upon the cellophane. Is that what I understood you to say?

A. It is essentially continuous.

Q. What I mean, Mr. Kercher, is that this bottom bar (indicating)—the longitudinal portion of that bar meets the transverse bar; is that right?

A. It does.

Q. Now, referring to Defendants' Exhibit A, can you point out any similarities or differences between the heater on that exhibit and Plaintiff's Exhibit 4?

A. They are essentially the same, with one exception. In the T-shaped element on Defendants' Exhibit A, a short section or notch is left in the heating surface of the heater in order that it may provide a space for the fold [146] retaining means to move back into so that it will be possible to bring the heater down on the bag. In other words, if it were not for this notch in this heating device, some different folding means would have to be built into this device, because it continuously lays on top of the bag and the bag is made and pulled up under the fold retaining means.

Q. Now, Mr. Kercher, the notch that you have pointed out, why doesn't that leave a gap in the seal on the bag; or if it does, would you please point out how the heater operates?

A. This heater operates essentially the same as the other heater in Plaintiff's Exhibit No. 4. In the machine—or, rather, I would correct that; it

(Testimony of Arthur Kercher.)

is Plaintiff's Exhibit No. 4. In Defendants' Exhibit A this heater is designed with a notch, and while the operation is essentially the same, means, as I said before, has to be provided for the fold retaining bar. In the case of Defendants' Exhibit, the folding of this bag over the mandrel, or the folding—the plate over which the bag is to be folded is extended for some distance back of this T-shaped heater, and when the heater comes down and seals the bottom and the sides of one bag a portion of the preceding bag is sealed, and that is drawn through the machine in a position where it is folded over and another bag is produced. In other words, it is just a successive operation.

The Court: Only it seals more than one bag in its operation; when it goes along it seals a portion of another bag; that is what you mean to say, isn't it?

A. In other words, if you were making a quantity of bags in the machine you would only have one more operation in order to seal the bags. That is, provided the bag is of the proper size. This sealing surface on this device can be adjusted, of course, to take care of different lengths of bag; but if this were extended the full extent up here which they did on the machine that I saw operate, a bag can still be made with the exception of this small gap in here, sealed on the longitudinal and the bottom seams without any essential difference.

(Testimony of Arthur Kercher.)

Mr. Flehr: Q. Now, Mr. Kercher, with the long bar in it, as you spoke of a moment ago, going the full length of that heater, without changing the heater, can you make both large and small bags upon the machine? A. You can.

Q. When you are making the largest size bag, how much of the succeeding bag would be sealed before that part of the paper came into the forward part of the machine?

A. If you were making the largest sized bag that it would be possible to make on the machine, all but a very small part of it, essentially the difference between the ends of these bars on the bottoms of the heaters would be sealed.

Q. Now, Mr. Kercher, would you point out in connection with Plaintiff's Exhibit 4 whether or not that machine incorporates a working table—an operating table, pardon me?

A. You have generally an operating table that is supported on four legs. The mechanism on the machine is placed above the operating table.

Q. And what is the prime function of the operating table?

A. It is to provide a base for the sealing of the bag.

Q. A base for the sealing—what do you mean?

A. It provides an anvil, as it were—some solid back so that when this bag is folded over the mandrel, when the pressure is applied to the top, certainly we must have some support under that

(Testimony of Arthur Kercher.)

mandrel in order to adjust it for the pressure that is necessary to cause the sealing of the bag.

Q. You are referring to that stationary part underneath the [148] mandrel?

A. I am referring to that stationary part underneath the mandrel.

Q. Do you find any part corresponding to that in the Schultz machine, Defendants' Exhibit A?

A. In the Schultz machine beneath the mandrel and across the end of the mandrel is placed a supporting means which is essentially a table upon which that bag is made.

Q. Would you please show the Court that supporting table?

A. We have in here a rigid, reinforced longitudinal and cross member in here which are rigidly supported by legs of the table and upon which the bag is made. When it is folded over the mandrel a heating element is pressed down on the element and sealed by heat.

Q. And would you briefly point out where that operating table is disclosed in the drawings of the patent in suit?

A. In the patent in suit in Fig. 9 it is clearly shown by the figure 10.

Q. Now, Mr. Kercher, would you please take Claim 2 of the patent and point out how you can—that is, if you can do it, point out how the elements of that claim are found in Plaintiff's Exhibit 4?

(Testimony of Arthur Kercher.)

A. In Claim 2 of the patent there is a frame forming an operating table. There is a frame here forming an operating table consisting of a plate that is placed upon legs. We have a plate-like mandrel movably secured to said table whereby a sheet of said material can be placed between one side of the mandrel and the table. That is indicated by this mandrel here that works—is movably mounted relative to the table in a vertical position. We have means for folding the side margins of the sheet over the side edges of the mandrel. Those are the sides that come over to fold the sheet over the top of the mandrel. We have means [149] for folding a projecting end over the end of the mandrel. This projecting end margin of the sheet has been obviously folded over the end of the mandrel. A means for applying a heated surface under pressure to overlapping portions of the side margins and to the end margin along an area where the end margin overlaps the side margins. We have a T-shaped pressing device and heater which come down on the top of the folded bag pressing and sealing the side margins and the end margins of the bag.

Q. Now, would you do the same thing, if you can, for Defendants' Exhibit A?

A. We have a frame and an operating table. In this case we have a T-shaped member that is fastened to the table, which takes the place of the plate-like mandrel in the other machine. We

(Testimony of Arthur Kercher.)

have a plate-like mandrel movably secured to such table whereby a sheet of said material can be placed between one side of the mandrel and the table. This contains a mandrel and a sheet of cellophane is placed between this mandrel and the table. We have means for folding the side margins of the sheet over the side edges of the mandrel. The cellophane is folded over the side edges of the mandrel in this machine. We have means for folding the projecting end margin of the sheet over the end edge of the mandrel. We have an end edge of this mandrel in the machine and we have means for folding the end of it back over that mandrel. And we have means for applying a heated surface under pressure to overlapping portions of the side margins and to the end margin along an area where the end margin overlaps the side margins.

Mr. Flehr: Your Honor, I don't intend to go over each of these different claims in detail, but I do wish to take certain representative claims and then we will introduce further evidence on it which will make it unnecessary to go over each of the claims.

Mr. Schapp: Are you through with this witness?

[150]

The Court: No, he is going to enter into a stipulation with you in relation to the claims and shorten up the proceedings.

Mr. Flehr: I think I can shorten the pro-

ceedings with Mr. Kercher. I have two more witnesses who will be short witnesses. However, I haven't them here to-day. I will have them tomorrow morning.

(Thereupon an adjournment was taken until Thursday, November 7, 1940, at ten o'clock a. m.) [151]

Thursday, November 7, 1940

10:00 O'clock a. m.

Mr. Flehr: Your Honor, I have two witnesses here who would like to conserve time as much as possible; they are very short witnesses, and I would like to have leave to interrupt the taking of testimony of Mr. Kercher, for the purpose of taking the testimony of these two witnesses.

Mr. Schapp: That is satisfactory.

JACK GOLDIE,

Called for the Plaintiff; Sworn.

The Clerk: Will you state your name?

A. Jack Goldie.

Direct Examination

Mr. Flehr: Q. What is your present occupation, Mr. Goldie?

A. Manager of the Hostess Cake Kitchen, Continental Baking Company.

* Q. Are you located here in San Francisco?

(Testimony of Jack Goldie.)

A. Yes.

Q. What is the business of the Hostess Company?

A. Manufacture cakes and cookies.

Q. Can you give us some idea of the size of the company?

A. Well, we operate about 90 plants in the United States.

Q. Do you know Mr. Rene Gaubert?

A. Yes.

Q. Of Oakland? A. Yes.

Q. The plaintiff in this case. Do you know anything about the purchase of one of Mr. Gaubert's machines for the manufacture of cellophane bags by your company? A. Yes, I do.

Q. Can you tell me approximately when the first machine was purchased from Mr. Gaubert?

A. I think it was in 1934.

Q. Could you examine the machines here on the floor and pick the machine which seems to you to most nearly approximate the machine which you purchased? A. The first machine? [152]

Q. Yes.

A. Yes. Well, it is that dark machine there, that is the first machine.

Q. That is Plaintiff's Exhibit 4. Immediately before you purchased that machine what was your company using in connection with the packaging of cookies and products of that kind?

A. We were purchasing bags.

(Testimony of Jack Goldie.)

Q. What kind of bags?

A. Cellophane bags.

Q. Various cellophane bags of the type found ordinarily——

A. We were purchasing a bag that had a window in it, and it was a wax bag on the sides.

Q. I hand you Plaintiff's Exhibit No. 2 and ask you if that is anything like the bag you were purchasing.

A. Similar to that type of bag in principle.

Q. Were these bags entirely satisfactory, Mr. Goldie? A. Not entirely, no.

Q. Could you remember any disadvantage of those bags?

A. Well, I believe a disadvantage would be they weren't—that is, they would tear when cookies were placed in them because the bag was not strong enough and consequently it wouldn't keep the cookies fresh.

Q. Why wouldn't it keep the cookies fresh, do you know?

A. Well, because paper is not as I would say—wax paper hasn't the moisture resistance that cellophane has.

Q. Did that problem exist in all of the various plants or branches of your company?

A. Correct.

Q. Was there available a so-called full cellophane bag at that time? A. Yes, there was.

(Testimony of Jack Goldie.)

Q. Can you tell me why you didn't use such a bag?

A. Well, the price was rather prohibitive at that time.

Q. That is, bags made by gluing cellophane together? A. Correct. [153]

Q. When you purchased this machine from Mr. Gaubert can you tell us anything with respect to the circumstances surrounding your contacting Mr. Gaubert to purchase that machine?

A. You mean the start of the contact, or at the time of the purchase?

Q. The circumstances leading up to and during the purchase of your first machine from him.

A. Well, the only thing I can state would be that due to the prohibitive price of cellophane bags, why we suggested, or I suggested to Mr. Gaubert that there was a great need for a machine that could be placed in individual plants for the manufacture of cellophane bags, because of the convenience it would be to the manufacturer as well as the tremendous lowering of cost.

Q. You made that suggestion sometime before you purchased the machine from Mr. Gaubert?

A. That's right.

Q. Then at a later date Mr. Gaubert did make and deliver the first machine to you?

A. That's right.

Q. Do you recall contacting him in between

(Testimony of Jack Goldie.)

that, the time of that suggestion, and the time of the delivery of the machine?

A. There were numerous times that he came to our plant and told of the progress he was making with the machine.

Q. Do you recall anything about the delivering of that machine, that is, how it operated; that is, if it operated successfully, or how?

A. Yes, it did. Of course, naturally, any machine that is placed into a practical operation has its simple difficulties, but they were not to any extent. The machine was brought up to our plant and put into operation, and it did a very good job.

Q. Do you recall the type of operator you put on that machine?

A. Yes. We put a girl on it.

Q. Was it a skilled girl, or unskilled?

A. She was unskilled at [154] the time she went onto it. She was skilled in the methods employed there, but not skilled in the handling of bag machines, because she never saw one before.

Q. Do you recall how long it took to train that girl to operate this machine?

A. Well, of course, seeing the principles were very simple it didn't take very long; I think it took a day or two, but she was soon onto the running of it.

Q. Did you subsequent to that date buy additional machines from Mr. Gaubert?

(Testimony of Jack Goldie.)

A. Well, our company purchased, I think, I don't know the exact number, because, naturally, we are all over the United States, but we purchased a number of machines from Mr. Gaubert for our different plants throughout the country.

Q. Well, in general, can you tell me what this machine meant to your company?

A. Well, of course, the purpose that the machine accomplished was the economic effect it had on our costs; it made a great saving in our wrapping material by reducing the cost of our bags approximately, I would say, about 50 per cent., 60 per cent.

Q. Do you recall the approximate speed of this machine, how many bags it makes?

A. I think at the time it was around 800 bags an hour, 800 to 900, something like that speed.

Q. The bags you make on the machine, are those working satisfactorily, are those bags satisfactory?

A. Yes.

Q. I am speaking now in contrast, or a comparison with the half cellophane bag, like Plaintiff's Exhibit 2.

A. It was a much better bag, naturally.

Mr. Flehr: That is all.

Mr. Schapp: No questions.

The Court: Q. Tell me, how far east do you go? A. To the Atlantic. [155]

Q. How long have you been in this business?

A. 15 years.

(Testimony of Jack Goldie.)

Q. These machines, do you know whether they are used in the East?

A. I think we are using them as far east as Detroit; I am not sure of New York, I think there is one in Hoboken; I am not sure.

Q. How long have you been located in San Francisco? A. Nine years.

Q. Each separate unit operates separately?

A. I operate the one unit, this one plant.

Q. How many other plants in California?

A. I think seven plants.

Q. Where is your place of business here?

A. 1501 Bryant.

Q. How many employees have you?

A. We have approximately about 140 people in this one plant.

Q. Just what do you manufacture?

A. We manufacture packages cakes and cookies.

Q. Packaged cakes and cookies. How many people did you say? A. 140 people.

The Court: I think that is all; thank you.

WILLIAM J. MEDER,

Called by Plaintiff; Sworn.

Mr. Flehr: Q. What is your occupation, Mr. Meder?

A. Manager of Mother's Cake & Cookie Company, of Oakland.

(Testimony of William J. Meder.)

Q. You reside in Oakland? A. Yes.

The Court: Q. Is this your competitor who just left the stand? A. Yes, sir.

Mr. Flehr: Q. Can you tell me the business of the Mother Company?

A. We manufacture cakes, soft cakes, cookies and crackers.

Q. Can you tell me the extent of your company's activities?

A. Well, we sell from the Mexican border up into Oregon, cover all [156] of California and come into Salt Lake.

Q. Approximately how many units do you have in your corporation?

A. There are 108 trucks selling for us now.

Q. You mean you only have one plant, and you have these 108 trucks? A. 108 trucks, yes.

Q. How many plants do you have?

A. Just the one plant.

Q. Located in Oakland? A. Yes.

Q. Do you know Mr. Rene J. Gaubert, the plaintiff in this case? A. Yes.

Q. Have you purchased any cellophane bag making machines from Mr. Gaubert? A. Yes.

Q. Do you recall approximately when you purchased the first machine from Mr. Gaubert?

A. As near as I can recall, around 1934 or '35.

Q. Among the machines on the floor, here, can

(Testimony of William J. Meder.)

you pick out the machine which to you approximates the machine which you first purchased?

A. The end machine with the roll on top.

Q. That is Plaintiff's Exhibit 4. Do you know whether the machine that you first purchased was one of the first manufactured by Mr. Gaubert?

A. I understand it was the second machine that he took, that is, for sale.

Q. Had you known Mr. Gaubert before that time?

A. Yes, I had known him for a year and a half or two years.

Q. Now, about the time you made this purchase from Mr. Gaubert, say in 1934 or 1935, what were you doing for cellophane bags in your establishment?

A. We were using a laminated wax bag with a cellophane face.

Q. Was that bag something like Plaintiff's Exhibit 2?

A. Yes. The cellophane was not as wide and this is only a single sheet. We were using a double wax sheet, two pieces of paper glued together with wax, and then the cellophane strip used through the center. [157]

Q. Was that bag entirely satisfactory?

A. No, it was not.

Q. What were some of the difficulties you had?

A. Well, we found the two sheets of wax would come apart under various climatic conditions, and

(Testimony of William J. Meder.)

would leave moisture into the bag and cause the cakes and materials in the bag to go soft, and also we found the price of that bag was fairly high and it seemed that the company that was making them was boosting the price continuously.

Q. Was there any other bag available to you at that time?

A. There was an all-cellophane bag.

Q. Was that bag made of a piece of paper with edges glued together?

A. That bag was made out of all-cellophane glued with an adhesive.

Q. Why didn't you use the all-cellophane bag?

A. The price was prohibitive.

Q. You say you did know Mr. Gaubert at a time before you purchased the machine from him. Did you know what Mr. Gaubert was doing in the way of developing such a machine before you purchased the machine from him?

A. Yes, I did know he was working on a machine.

Q. Did you see him working upon that machine?

A. Yes. He invited me out to take a look at a rotary cake-wrapping machine he was working on. I remember the incident very well, because I was very much put out due to the fact that the firm that was making these cellophane bags were continuously upping the price and when Mr. Gaubert showed me this cake-wrapping machine he was

(Testimony of William J. Meder.)

working on I made the suggestion that he should make a machine to make cellophane bags, and he took me by the arm and said, "Come back here, I want to show you something." And he showed me another machine made out of wood that he claimed he could develop [158] to make cellophane bags.

Q. Do you see anything on the floor, here, like that machine?

A. This machine, here, is the one he showed me.

Q. The machine is Plaintiff's Exhibit 3.

A. Of course, I encouraged him, because that was just the thing that I had been looking for.

Q. Do you recall when you placed the order for the machine which you subsequently purchased?

A. It appears to me that it was right close to the end of 1934, or the first of 1935.

Q. Then, did I understand you to say you contacted, or visited Mr. Gaubert—strike that.

Did you visit Mr. Gaubert's shop between the time of the visit when you saw this wooden model, Plaintiff's Exhibit 3, and the time he made delivery to you?

A. We visited back and forth. Of course, I was very much interested in the machine and any suggestion that I had that would help him develop it, of course he was welcome to it.

Q. This machine, when you purchased it from Mr. Gaubert, how did it operate? I mean from the standpoint of success or failure, did it work well?

(Testimony of William J. Meder.)

A. Yes. It was much cheaper. It holds the goods fresher a much longer time.

Q. Is the machine easy to operate for an ordinary girl? A. What is that?

Q. How easy was the machine to operate for a girl?

A. Of course, you can put any girl on it and she would be rather slow to start, but within a very short time why she would be making seven to nine hundred bags an hour.

Q. That is, according to your understanding, then, this machine indicated as Plaintiff's Exhibit 4 makes from seven hundred to nine hundred bags per hour? A. Yes. [159]

Q. So far as you are concerned, what did having this machine mean to your company? Did it aid your company in any way?

A. Yes. It, of course, keeps the goods fresher and that has stimulated the sale of cookies, especially during the winter, damp season, and it also cut down any price ups that we had so often; also made it possible for us to slightly increase the quality or quantity of our goods in direct proportion to the savings we made.

Q. About these different bags you make on Mr. Gaubert's machine, can you give me any idea of the relative cost as compared to the window type cellophane bag which you had previously used?

A. Yes. I took occasion to look at it, look that

(Testimony of William J. Meder.)

up, and I will quote from the record. In December, 1934 cellophane bags 51½ by 11½, our records show we paid \$6.65 per thousand. On present cellophane bags 3 MST, moisture-proof, manufactured with our own machine, 51½ by 11½, costs us \$3.69 per thousand. I also called up Zellerbach & Company——

Q. Well, just a moment. You mean recently?

A. Yes. You don't want that?

Q. Well, have you reference to any records which you had back of that time which would give the cost of the all-cellophane bag?

A. No, because we didn't use the all-cellophane bag.

Q. Do you recall approximately what the quotation was at that time?

A. It appears to me that we saved between 40, 50 and 60 per cent. over the all-cellophane bag. I know the all-cellophane bag was so high we didn't even consider it.

Q. Subsequent to your purchase of the first machine from Mr. Gaubert, did you purchase any additional machines from Mr. Gaubert?

A. We purchased an additional one a year to a year and a half later.

Mr. Flehr: That is all. [160]

The Court: Any questions?

Mr. Schapp: No questions.

The Court: Q. Tell me, you say your company goes so far east as Salt Lake? A. Well——

(Testimony of William J. Meder.)

Q. Do you have your own baking plant there?

A. No. We ship mostly cookies and crackers.

Q. What about the cakes?

A. Well, we don't ship the cakes that far.

Q. How far do you ship the cakes?

A. We only ship cakes where we can get over-night service by express. Beyond that it is all cookies and crackers.

The Court: That is all; thank you.

Mr. Schapp: No cross-examination.

Mr. Flehr: I asked Mr. Schultz to produce certain things. I asked Mr. Schultz to produce certain documents.

Mr. Schapp: Yes.

Mr. Flehr: Is he ready to produce them?

CHARLES F. SCHULTZ,

Recalled by Plaintiff; Previously sworn.

The Witness: I will show you the three things you asked for. You asked me to verify a date. This is our heater showing the arrangement of the springs for the distribution of pressure down. You mentioned the three bolts that hold the heater in place. The machines we have manufactured were manufactured with two bolts. The machine that you see in our plant, that you saw in our plant, and

(Testimony of Chas. F. Schultz.)

from which you made your drawing, had three bolts holding this here. That is the only machine that I recall that we have used the three bolts, and that machine has been used for our own purpos- [161] es. It has not been sold. It is possible to use two or three bolts; one at the extreme end, also one at the other extreme end of the heater. It is also possible to use three bolts at the extreme ends of both heaters.

Q. Mr. Schultz, why did you make the one with three bolts?

A. We made the one with three bolts as an experiment to see whether it would hold these heaters more securely than the two.

Q. To make that clear, as I understand what you are saying, as I understand what you say here, you attach this heater structure to a casting on the back by means of two bolts and one bolt attached here; is that correct?

A. It is attached here.

Q. How was it attached?

A. It is tapped and a stud is screwed into the heater.

Q. It is also bored and bolted to the stud, screwed into that?

A. Yes.

Q. At the other extreme end of the leg of the T you say you did make one in which you used a bolt?

A. A bolt.

Q. At the end of the leg of the T?

A. That's right.

Q. Then you tapped in at the end of the—

A. The other heater, yes, as an experiment to see which was best.

Q. Which was best?

A. We haven't decided. We can use either.

Q. Isn't it true, Mr. Schultz, that when you use three bolts and then by adjusting those bolts you can adjust very readily the position of the heater so that it is properly prepared for the mandrel?

A. The fact remains you naturally adjust it to the position and with two bolts it is important that these springs are exactly the same length. With the three bolts it is possible to cut these springs at random lengths and, as you suggested, by adjustment hold this thing in alignment, either being perfectly satisfactory. [162]

Q. That, then, would be a three point attachment?

A. As my knowledge of your experiment goes, your three points of attachment, as you recall, are spoken of as pads. Do you recall that? They are not spoken of as studs, they are spoken of as pads, and also it says these pads are to equally distribute the pressure on the heater. Your three points mentioned in your patent, as I understand it, are to press all three studs with pressure down on the heater, and there is nothing said about the attachment up; it merely fastens the heater in place.

Q. How about those three studs?

A. What do you mean, how about the three studs?

(Testimony of Chas. F. Schultz.)

Q. I mean you told me that our structure—I will ask you—I will ask you specifically if what you had was not a form of three point attachment between the bag and the heater?

A. The one you have referred to, there are two directions of force, one is the pressure down and one is pressure up. If you speak of the pressing to hold it in place with three points—if you are speaking of holding it in place there is something else to mention. That is what I referred to. You talk about the three points of pressure down in the form of pads. They are spaced on there, one in the center and two pads pressing down at spaced intervals on the T portion of your heater.

Q. But you do have a three point attachment between the bag and the heater?

A. In one portion we have three points of attachment.

Q. When the heater comes down upon the mandrel is there any movement between the stud and the bag?

A. Depends on the adjustment of the heater. If the machine is adjusted and held down there may be some movement in the pressing of these springs upon our machine. There may be some swinging of the casting, itself, in the construction of the defendant's machine, or plaintiff's [163] machine.

Q. In other words, you don't adjust the machine so there is any spring in the coil spring?

A. Not appreciably.

(Testimony of Chas. F. Schultz.)

Q. So the coil spring simply becomes a convenient pressing means between the bag and the heater?

A. That is correct, and also if the studs should get out of alignment, if a stud or any other part should become not in perfect alignment with the heater, that is the purpose of the springs; they are adjusted to work continuously to any degree.

Q. But ordinarily you get a line on the machine by adjusting the studs and then the studs are tightened up rather tightly so when the heater comes down there is no movement between the studs——

A. Well, in practice I have seen a slight movement. As we try to adjust the machine we try not to have that, but it is physically impossible to keep it from working to some extent, depending upon if everything were in perfect alignment. It is not necessary for them to move.

Q. In other words, you do not normally expect to have the movement?

A. We would rather not have a large amount of movement, because it causes the studs to wear in the holes.

Q. When this heater is operating those springs do not act as——

A. (Interrupting) They act in one sense to equally distribute the pressure there. That is the primary function there. The next function is——

Q. Well, answer the question.

A. If I understand your question, the machine has served its purpose if we watch the studs and

(Testimony of Chas. F. Schultz.)

keep adjusting until the movement is very, very slight or nil.

Q. In other words, ordinarily as you adjust those studs the springs would operate as a cushion when the heater comes down and goes back up?

A. Ordinarily. I don't believe, however— [164]

Q. Now, did you produce another part of your machine?

A. You asked for the lock that we have that holds on our plate. This is the only one we had available. It consists of the two prongs and a bolt straight through. There is a handle so it can be locked so as to make it rigid.

Mr. Flehr: I offer in evidence the lock produced.

The Court: Admitted and marked.

(The device was marked "Plaintiff's Exhibit 12.")

Mr. Flehr: Q. I will also offer in evidence the additional bracket—what do you term that, Mr. Schultz?

A. We call it the foot for the plate?

Mr. Flehr: The bracket, foot for the plate, on the mandrel.

(The device was marked "Plaintiff's Exhibit 13.")

Mr. Flehr: Q. You say with the heater constructed as you have described it with respect to Plaintiff's Exhibit 12 you have constructed such a machine that has been used in your establishment?

(Testimony of Chas. F. Schultz.)

A. We have demonstrated it in our establishment. We are not using it.

Q. You mean it was demonstrated to some prospective purchasers?

A. No. We demonstrated it just as experiment to see how that part would work, and it so happens we are not using the machine. The machine may be sold later but it has not been sold to date.

Q. Do you mean you used it experimentally?

A. Yes, we do a great deal of experimenting.

Q. I believe I asked you to produce certain records, Mr. Schultz.

A. I looked for a date and I find the sale to Koster Candy Company, instead of 1938, as I remembered, was in 1939.

Q. I asked you to produce certain records——

A. There was no signed order taken from Mr. Koster.

Q. Mr. Schultz, if you remember your testimony, I believe you [165] first said that sale was in 1937, if I remember correctly.

A. I said 1937, changed it to 1938.

Q. Now, you change it to 1939.

A. I had not looked up the matter. I was quoting from memory. I looked it up and find it is 1939.

Q. When did you first commence the distribution of your machine?

A. We developed our machine, as I remember, in 1935 and '36.

Q. I believe yesterday you said 1937.

(Testimony of Chas. F. Schultz.)

A. 1936.

Q. 1936. What record have you of that?

A. Not available at the present time.

Q. What do you mean, not available?

A. Well, I don't know what kind of records you require.

Q. Do you have any drawings of your machine dating back to that time?

A. We have none dated at that time, I don't believe.

Mr. Flehr: That is all.

Cross Examination

Mr. Schapp: Q. Mr. Schultz, may I just ask you a question or two? A. Surely.

Q. In connection with the three-point attachment. Have you studied the Gaubert patent?

A. I understand it very thoroughly.

Q. Just what does the Gaubert patent refer to as consisting of three-point attachment?

A. As I recall from the study——

Mr. Flehr: Just a moment. This man has not been qualified as a patent expert, your Honor.

Mr. Schapp: Well, he is an inventor, himself. He is the defendant in the case. He is qualified—he has testified about machines. He ought to know something about the machine.

Mr. Flehr: A man is called under Rule 43B for cross-examination. Do you wish to make him your witness?

(Testimony of Chas. F. Schultz.)

Mr. Schapp: No. This is for the purpose of cross-examina- [166] tion.

Mr. Flehr: I am sorry, but it is improper, your Honor, for this man to cross-examine his own client.

Mr. Schapp: But you went somewhat out of your way in introducing the defendant.

Mr. Flehr: But it is perfectly proper for me to cross-examine the witness, Mr. Schapp.

Mr. Schapp: Q. Mr. Schultz, let me ask you another question. I wish to read to you from the Gaubert patent.

Mr. Flehr: Just a moment, Mr. Schapp. What is the purpose of this questioning?

Mr. Schapp: Well, I want to bring out in more detail about these pads you have been talking about.

Mr. Flehr: Are you going to ask him to interpret the patent?

Mr. Schapp: No. I am going to read to him.

Mr. Flehr: I object to any question along this line as cross-examination of his own client.

The Court: He is limited, of course, to the scope of direct examination.

Mr. Flehr: Limited to the scope and I think cannot ask leading questions.

Mr. Schapp: Very well. I will put it off until later.

The Court: You can make him your own witness if you want to. Is that all for this time?

Mr. Schapp: Yes, that will be all at this time.

The Court: All right.

ARTHUR JEROME KERCHER,

recalled;

Direct Examination

(Resumed)

Mr. Flehr: Q. Now, Mr. Kercher, I believe at the time you [167] interrupted your testimony you had applied Claim 2 to the patent in suit, of the patent in suit, to both Plaintiff's Exhibit 4 and Defendants' Exhibit A. A. Yes.

Q. Will you take Claim 3, and, if you can, apply it to Plaintiff's Exhibit 4, take it element by element?

A. In Claim 3 as it applies to Defendants' Exhibit A, we have here, "A frame forming a working table, a plate-like mandrel movably mounted with respect to the table whereby a sheet of said material may be placed between said mandrel and the upper surface of the table, means for folding projecting side margins of the sheet over the side edges of the mandrel, means for folding a projecting end margin of the sheet over one end edge of the mandrel, and retractable fold line retaining means adapted to be interposed within the last-mentioned fold."

This claim in Plaintiff's Exhibit 4 is also represented by a "frame forming the working table, a plate-like mandrel movably mounted with respect to the table whereby a sheet of said material may be placed between said mandrel and the upper surface of the table, means for folding projecting side mar-

(Testimony of Arthur Jerome Kercher.)

gins of the sheet over the side edges of the mandrel, means for folding a projecting end margin of the sheet over one end edge of the mandrel, and retractable fold line retaining means adapted to be interposed within the last-mentioned fold."

Now, in regard to this machine, it is apparent that both means are constructed substantially in the same way. In other words, the parts that function to do these things are equivalents. I explained that by this means it is perfectly obvious that it is the different type of device to accomplish the method of folding the projecting side margins of this cellophane over this bar.

Q. In that connection will you point out the way in which these [168] two rollers operate on Exhibit A?

A. I was about to continue the explanation, your Honor, and indicate to you why this device is made in this manner, and why it is built in this way. As I stated yesterday it is perfectly obvious if you took a sheet of paper, or sheet of cellophane, and it had some considerable distance, it would be possible to apply the side blade of Plaintiff's device No. 4 over the side of this mandrel, and if this material, cellophane, by over-lapping edges on top of the mandrel, that can be accomplished and the device in this machine, on the end of the mandrel, this device simply means that this whole mechanism can be shortened, because drawing this cellophane over the edge of the mandrel, here, permits a loosening on the side

(Testimony of Arthur Jerome Kercher.)

of this cellophane, permitting it to be easily folded over the top of the mandrel. For instance, when you are going around a corner, when you are going around two sides of a triangle it is a shorter distance across between the ends of the triangle, the hypotenuse, it is simply a shorter distance than the sum of the two sides. So this sheet has a looseness on the side. That is not necessarily the folding means. The folding means in this machine are two rollers which perform three functions. They serve to fold a sheet of cellophane material which is introduced over the end of this mandrel; they serve to tighten the cellophane material over the sides of the mandrel, and also they tend to hold that cellophane in place when the heater comes down and makes a longitudinal seal of the cellophane on the mandrel.

In Plaintiff's model, No. 4, Exhibit 4, we have an equivalent device. The two blades which operate successively attaching, or controlling the movement of cellophane over the top of the mandrel. There are springs under those blades, they are rather difficult to see in this machine, but they perform exactly [169] the same function, in substance the same thing as the roller was on Defendants' Exhibit A. These plates here serve the function of not only helping attach it there but they hold it in contact with this mandrel and they hold it while they tighten it on the mandrel, and they hold it while the heater comes down. Referring to the patent in

(Testimony of Arthur Jerome Kercher.)

suit, I think you will—referring to the drawing on Fig. 14, there are indicated under the side plate, or the plate that folds the cellophane over the top of the mandrel in the Gaubert patent, certain springs, a series of springs; they are marked with the figures 58; in the Fig. 15 they are shown as dotted lines which extend for some distance below the surface of the plate which causes the cellophane to be moved over the sides of the mandrel. Referring to the patent again, on page 2, we have in the specification in the right-hand column near line 55 a description which I will quote:

“The under side of each folding member carries a plurality of spaced leaf springs 58. These springs gently engage the upper surface of the mandrel, to facilitate formation of a distinct fold to somewhat tighten the sheet upon the mandrel, and to hold the folded margins during the sealing operation.”

We have equivalent means in the defendants' Exhibit A. These means are these two rollers that are set on an angle, so designed that when this material is primarily folded under that they tend to fold, continuously fold this loosened material over this mandrel. They tend to tighten the material on the mandrel, and they also hold the material on the mandrel while this is coming down.

Q. What is it about these rollers on Defendants' Exhibit A which causes them to exert a tightening effect upon the cellophane?

(Testimony of Arthur Jerome Kercher.)

A. They are set, you will note, on an angle, and they are ad- [170] justed in a manner that would cause the cellophane to roll together over the edges of the thing. You can visualize that by trying to run a belt over or on pulleys which are out of line. The belt will continuously run off one side. This is simply an adaptation of that principle.

Q. Mr. Kercher, would you refer to Claim 18 of the patent in suit and briefly apply that element by element to the two structures, Plaintiff's Exhibit 4 and Defendants' Exhibit A, if you can?

A. In Claim 18 we have, "In a machine for forming bags from sheet 'Cellophane' or like material, a mandrel, means for folding over side and bottom margins of the sheet over the mandrel through angles of substantially 180 degrees, thereby forming a T-shaped overlap area on one side face of the mandrel."

It is quite evident that both sides of the cellophane in this machine are folded over substantially 180 degrees; also the end of the sheet that projects over the end of this mandrel is folded over substantially 180 degrees, also the end of the sheet that projects over the end of this mandrel is folded over substantially 180 degrees. We have also "A heater having a similar T-shaped heated surface." You have a heater which has a T-shaped heated surface which corresponds to the sealing of the overlap on the bag that is being made on the mandrel, and "Means for pressing said heated surface upon said

(Testimony of Arthur Jerome Kercher.)

overlap area." We have here a mechanism operated by a cam system which draws down the pressing means, which in this case is heated on an overlapping area of the bag.

In Plaintiff's Exhibit 4 we have a mandrel. We have means of folding over side and bottom margins of a sheet of cellophane over this mandrel and you have the substantial 180 degrees. We have a heater having a similar T-shaped heated surface, and there [171] are means here which are obviously for pressing the said heated surface upon the said overlap area.

The Court: We will take a recess.

(After recess:)

Mr. Flehr: Your Honor, you will probably recall at the time I made my opening statement I said that I might ask that Claim 11 be withdrawn as the evidence would develop in this case. Now, Mr. Schultz's testimony with respect to this heater is at variance with the pleadings. The matter really is not of sufficient consequence to argue about, so I would like to have leave and I ask leave to withdraw Claim 11 without prejudice.

The Court: So ordered.

Mr. Flehr: I would like to explain also that at the time I made my opening statement I made one statement which was at variance with the pleadings; that covers the numbering of the claims upon which we were relying. I explained about Claim 19, which has been cited in the pleadings as also being in-

(Testimony of Arthur Jerome Kercher.)

fringed, and I would like to correct that statement.

Mr. Schapp: That is correct.

Mr. Flehr: Q. Now, Mr. Kercher, would you apply Claim 14, take Claim 14, and, if you can, apply that claim to the method carried out in the Plaintiff's Exhibit No. 4.

A. Claim 14: "In a method for making bags from sheet material like 'Cellophane', characterized by the use of a plate-like mandrel having a contour corresponding generally to the contour of the finished bag."

We have in Defendants' Exhibit A a plate-like mandrel that has a contour which is substantially the contour of the finished bag.

"Arranging the sheet of material adjacent one side of the mandrel." [172]

In this machine a sheet of material has been passed under the mandrel and consequently it is on one side of the mandrel.

"Successively folding the projecting side margins of the sheet through angles of substantially 180 degrees and over the side edges of the mandrel."

That element is also incorporated in this Exhibit A, in that the cellophane sheet is folded substantially at an angle of 180 degrees and over the side edges of the mandrel.

"Folding a projecting end margin of the sheet through an angle of substantially 180 degrees and over the adjacent end edge of the mandrel, whereby both the folded side and end margins are in substantially a common plane."

(Testimony of Arthur Jerome Kercher.)

It is evident in this Exhibit A that the end of the bag projecting over the end of the mandrel is folded over the top face of the mandrel, and very substantially in a common plane.

“And then applying pressure and heat to the overlapping portions of the folded side margins of the sheet and also to that portion of the end margin overlying the folded side margins.”

That is evident here, because the heating device is so arranged that heat is applied to folded side margins and over the overlapping end margin of the sheet.

This is also accomplished in Plaintiff's Exhibit 4. We have a method of making bags from sheet material like cellophane and it is characterized by the use of a “plate-like mandrel having a contour corresponding generally to the contour of the finished bag, arranging the sheet of material adjacent one side of the mandrel.”

In this case the sheet of material is placed under the mandrel.

“Successively folding the projecting side margins of the sheet through angles of substantially 180 degrees and over the [173] side edges of the mandrel, folding a projecting end margin of the sheet through an angle of substantially 180 degrees and over the adjacent end edge of the mandrel, whereby both the folded side and end margins are in substantially a common plane.”

That is accomplished in this machine essentially the same as it is accomplished in the other one.

(Testimony of Arthur Jerome Kercher.)

“And then applying pressure and heat to the overlapping portions of the folded side margins of the sheet and also to that portion of the end margin overlying the folded side margins.”

It is quite evident they are folded over on a common plane, because the mandrel happens to be flat. It is evident that there is an overlap of the cellophane on the mandrel. The end is folded over the end of the mandrel and the pressure or heating means applies pressure and heat that is T-shaped, and folds on top of the mandrel.

Q. Mr. Kercher, you have applied claims 2, 3, 14 and 18 to both Plaintiff's Exhibit 4 and Defendants' Exhibit A. A. I have.

Q. Can you similarly find the elements of the remaining claim in suit in both Plaintiff's 4 and Defendants' Exhibit A? A. I do.

Q. Have you prepared an analysis of all of the claims in suit as a summary of your testimony in conjunction with the claim No. 11? A. I have.

Q. Can you identify the paper I am handing to you?

A. This is a copy of the claims in suit which I have in fact just been talking about. I have been taking the claims element by element and referring to the machine in one instance, and in the other instance I referred to them by numbers on a drawing which indicates the different parts on the machine.

Q. In other words, by following that analysis

(Testimony of Arthur Jerome Kercher.)

one would find the [174] parts in the Schultz machine corresponding to Defendants' Exhibit A?

A. They would.

Q. By reference to the numbers upon the drawing Plaintiff's Exhibit 11? A. Yes, sir.

Mr. Flehr: I offer in evidence the analysis of the claims which the witness has just testified as illustrative of the witness' expert testimony.

Mr. Schapp: Have you an extra copy of that, Mr. Flehr?

Mr. Flehr: Yes, I have.

Mr. Schapp: Will you give me one?

Mr. Flehr: Yes, indeed. I ask that be marked Plaintiff's Exhibit No. 14.

The Court: Have you a copy for counsel?

Mr. Flehr: Yes, I have.

(The document was marked "Plaintiff's Exhibit 14.")

Mr. Flehr: Mr. Schapp, I wish to put in evidence a bag as made by Defendants' Exhibit A. Could you let me have such a bag?

Mr. Schapp: Beg pardon?

Mr. Flehr: I say I wish to put in a bag in evidence such as made by Defendants' Exhibit A.

Mr. Schapp: Have you got a bag, Mr. Schultz?

Mr. Schultz: We haven't one here. We can make one during recess, or sometime.

Mr. Schapp: We will certainly do that.

Mr. Flehr: How about these bags, here?

(Testimony of Arthur Jerome Kercher.)

The Court: There are some there.

Mr. Flehr: May I take one of these?

Mr. Schultz: They are not perfect, but you may take that.

Mr. Flehr: I offer in evidence a bag produced by the machine, [175] Defendants' Exhibit A.

The Court: Admitted and marked.

(The bag was marked "Plaintiff's Exhibit 15.")

Mr. Flehr: Also at this time I offer in evidence a circular of a machine corresponding generally to Defendants' Exhibit A.

The Court: Admitted next in order.

Mr. Flehr: To be marked Plaintiff's Exhibit 16.

(The document was marked "Plaintiff's Exhibit 16.")

Mr. Flehr: I also offer in evidence a group of five photographs of a machine corresponding generally to Defendants' Exhibit A, to be marked Plaintiff's Exhibit 17.

(The five photographs were marked "Plaintiff's Exhibit 17.")

Mr. Schapp: Your Honor, to this I object as applying to the latest machine that was not manufactured until 1940.

Mr. Flehr: This, your Honor, is simply a photograph of an automatic machine manufactured by Mr. Gaubert. I simply wish to put it in the record for the sake of completeness in case that machine is taken away from the court.

The Court: It will be admitted and marked.

(Testimony of Arthur Jerome Kercher.)

Mr. Flehr: I offer in evidence a photograph of Plaintiff's Exhibit 6, the same to be marked Plaintiff's Exhibit 18.

(The photograph was marked "Plaintiff's Exhibit 18.")

Mr. Flehr: Q. Mr. Kercher, have you studied the various prior art patents which are cited in the answer to the complaint in this case?

A. I have.

Q. And are you thoroughly familiar with that prior art?

A. I have studied it to some extent and I think I am familiar with them.

Q. Do you find in the prior art anything disclosing the combination of elements in the claims in suit? A. I do not. [176]

Q. In general, what can you say with respect to the results accomplished by the two machines, Plaintiff's Exhibit 4 and Defendants' Exhibit A?

A. The results accomplished are certainly different than anything that was accomplished by any of the devices illustrated in the prior art, which would indicate that the invention of the machine patented by Mr. Gaubert is rather a pioneering device, and I saw nothing in the prior art that would indicate the completeness of the elements in the claims that would permit anybody to design such a machine without considerable experimentation and invention.

(Testimony of Arthur Jerome Kercher.)

Q. With respect to the bags produced by the two machines, will you point out generally whether they are similar or different?

A. The bags are similar. They are made by the same method and same material being use, and same adjustments on the machine being made, they would necessarily be identical.

Q. Mr. Kercher, are you familiar with Plaintiff's Exhibit No. 6, the automatic machine?

A. I am.

Q. Have you studied that machine from the standpoint of determining whether or not it also embodies the combination of elements recited in the claims in suit? A. I have.

Q. Do you find those combinations in Plaintiff's Exhibit 6? A. I do.

Q. Then you would say that Plaintiff's Exhibit 6 also embodies the invention of the patent in suit?

A. Yes.

Q. Mr. Kercher, have you seen a moving picture of a machine corresponding to Defendants' Exhibit A? A. I have.

Q. And saw the action of it when it is in normal operation?

A. I did. I desired to visualize and show that the mandrel moves vertically, up and down on the table.

Q. That is during the normal operation of the machine? A. Yes [177]

Q. When it is driven from an electric motor?

(Testimony of Arthur Jerome Kercher.)

A. Yes.

Mr. Flehr: Do you wish to see that moving picture now, your Honor? It will only take a very short time, and I would like to put it in evidence.

The Court: Very well. How are you going to set it up?

Mr. Flehr: It won't take but a moment. Do you wish to take a recess while we are setting it up?

The Court: Go ahead and set it up.

(During the showing of the moving picture the following proceedings took place.)

Mr. Flehr: Will you point out the action of the machine?

The Witness: You will notice that the plate upon the bed of the machine is this line in here. You will notice that thin line moving up and down on that bed. That is the sheet of cellophane wrapped around the mandrel. This is better indicated in this picture, the point about the mandrel which moves up and down each time the heater moves up and down on the bed of the machine.

Q. The back part of the mandrel, there, is that also moving?

A. The back part of the mandrel is moving but not quite as much, because that is the rear end.

Q. Could you tell how these pictures have been taken, at what speed?

A. These pictures have been taken at several speeds. They were taken at 64 pictures a second, 32, and at the regular camera speed.

(Testimony of Arthur Jerome Kercher.)

Mr. Flehr: I don't know whether you can see the action back there, or not, your Honor. It is rather difficult to see it.

The Court: What causes the movement?

The Witness: The movement is caused in the machine for two reasons. In one case the heater presses the mandrel down on the bed of the machine and it naturally springs back. In the other [178] case the feeding mechanism lifts while it is pulling the cellophane over the mandrel, lifts it up.

The Court: Is a vacuum caused there?

The Witness: I don't think a vacuum has anything to do with it, your Honor.

The Court: All right. Put it on slow motion then and we will see. Cut down your speed.

Mr. Flehr: This is slow motion, your Honor.

The Court: He can put it on slower. Is that an Eastman or a Bell?

Mr. Gaubert: This is an Eastman, your Honor.

The Court: Well, the Bell is the best machine, isn't it?

Mr. Gaubert: Yes, it is.

The Witness: Your Honor, this is the mandrel on the machine. That is the part that comes forward. The picture a little later will show a little different view. It will show it larger.

The Court: Is that the paper or the tongue?

The Witness: The cellophane in this case is folded around the mandrel.

(Testimony of Arthur Jerome Kercher.)

The Court: Where does the fold go, on top or on the bottom?

The Witness: The fold is on the top. This, here, shows the fold and the end means that moves back and forth. It is a distinct vertical motion of the mandrel on the bed of the machine.

The Court: Yes; there it is. Now I can see it. Now I see what causes it. It is that attachment.

The Witness: The feeding device has a tendency to lift it.

The Court: Yes.

Mr. Schapp: Your Honor, so I won't have to repeat on this, may I ask two questions?

The Court: Certainly. [179]

Mr. Schapp: On cross-examination.

The Court: Certainly.

Mr. Schapp: Q. Mr. Kercher, you see some bolts sticking up here with a head on the top, a nut. If that nut was screwed down would it still have the same effect?

A. I imagine it would to a certain extent. In that particular machine they happen to be springs that were placed on there to prevent the augmented motion of that mandrel going up and down.

The Court: All right.

(Showing of moving pictures was thereupon concluded.)

Mr. Flehr: I offer in evidence the film which has just been shown to the Court, showing the operation of Defendants' Exhibit A, the same to be marked Plaintiff's Exhibit—

(Testimony of Arthur Jerome Kercher.)

The Court: Admitted and marked, next in order.

(The film was marked "Plaintiff's Exhibit 19.")

The Court: Any questions?

Cross Examination

Mr. Schapp: Q. Mr. Kercher, I understand you have filed a good many patent applications, yourself. Did you prosecute those patent applications, yourself? A. I did not.

Q. Did you have counsel to prosecute them for you? A. I always employ counsel.

Q. Did Mr. Flehr happen to be your counsel in those patent applications?

A. In possibly eight or ten of them, recent ones.

Q. In the recent ones. A. Recent ones.

Q. What is your present occupation?

A. I do research work for myself.

Q. I thought you were connected with a company at the present time.

A. I am Vice-President of Wesex Electric Heater Company, and incidentally I do their research work, but my research work has [180] been done in the line of refrigeration. I do research work in temperature control and have been doing some fundamental scientific research work that probably won't result in anything.

Q. Have you served as expert before in litigation? A. I have.

Q. Do you hold yourself out as a professional expert in patent litigation?

(Testimony of Arthur Jerome Kercher.)

A. I do not. I feel that I am perfectly competent, however, to read patents and estimate the value of the claims as they are applied to the different pieces of apparatus and methods and devices.

Q. Now, Mr. Kercher, just what do you consider the duties of an expert when he testifies in court?

A. To give his honest opinion concerning the application of the elements of the claims to the elements in the claimed device that we are talking about.

Q. Do you have any idea as an expert that an expert serves the purpose by merely accepting the opinion of his client, merely stating the case in favor of his client, or do you consider an expert more a man who is able and competent to thoroughly understand the nature of the invention regardless of how his client is affected?

A. No. I can answer that by telling you exactly how I was drawn into the last case that I was in.

The Court: This case will be sufficient for all purposes.

The Witness: Well, it will indicate that when I accepted the opportunity of discussing the patent claims I assured myself that what I was going to say was my own opinion, and not the opinion of anybody else, or not the opinion of counsel who employed me, and I honestly believe that what I am talking about is for the benefit of the merits of the case.

(Testimony of Arthur Jerome Kercher.)

Mr. Schapp: Q. If during your cross-examination something should be brought to your attention that makes you change your opinion, would you hesitate to say so?

A. I would not hesitate to [181] say so if I would change my opinion.

Q. Mr. Kercher, throughout the patent in suit, of which you, of course, are thoroughly familiar, you heard the term "sheet" used, throughout the claims. A. Yes.

Q. At the beginning of each claim and several times in each claim. Now, referring to the patent, itself, what do you interpret the term "sheet" to mean?

A. Sheet means—in this case, that is a sheet of cellophane, a material rolled out in a thin membrane that has a great deal of width and very little thickness.

Q. Would the shape have anything to do with it? Could you use any sort of sheet as used in that patent?

A. The shape would be immaterial as long as it accomplished the result to make the product that you wanted to make.

Q. Well, as a matter of fact, isn't it necessary in the Gaubert machine to use a sheet that is pre-formed substantially to furnish the material for a bag? A. I don't believe that it is.

Q. Could you use a roll on the Gaubert machine?

A. I think you could, yes. I know you could.

(Testimony of Arthur Jerome Kercher.)

Q. Would you like to do it?

A. It would be perfectly feasible providing you added means for subdividing the roll or sheet which is in the form of a roll into sections.

Q. Taking the Gaubert machine as disclosed in the patent, could you take a roll of cellophane and use it in connection with that machine without any intermediate steps? A. I wouldn't, no.

Q. You would not?

A. I would certainly cut the roll of sheet material into sections before I would put it into the machine.

Q. In other words, you would first take the roll into pre-formed sheets which fit on the machine and which are sufficient to make the individual bags, is that your idea?

A. Well, as far as that is concerned, you certainly know, it is quite evident the [182] machine is primarily designed to——

Q. (interrupting) If the term "sheet" is used throughout the claims doesn't that term "sheet" imply to you it has to be a sheet that is preformed to fit into that particular machine?

A. I don't believe that that is true.

Q. You said a little while ago you could not use a roll without going through intermediate steps.

A. Yes, but I can use the roll, I could use the roll. In other words, the introducing of that material under the mandrel can be introduced from a

(Testimony of Arthur Jerome Kercher.)

roll and it can be cut off in the operation of the machine.

Q. Is the machine made to operate that way?

A. Some of them are.

Q. The patented machine——

A. In the patented machine, the specification of that machine defines a sheet of material must be placed under it in its entirety.

Q. You are willing to admit you could not use a roll with that particular machine without first forming it into sheets?

A. Without first cutting it off into sections.

Q. If the claims call for a sheet and, according to the patent, they are pre-formed sheets, and if you tried to consider that term to include all possible sheets, don't those claims then define an inoperative device that wouldn't work where the claim goes beyond what the machine will do?

A. I don't believe it. I believe the elements in that claim are incorporated in the machine, and it is immaterial whether that sheet is placed in there in the form of a rectangle or the form of a square, or placed in there in a roll and cut off.

Q. Do you think it must be a sheet that fits into the machine to make it work?

A. It must be a sheet that can be adapted to the machine.

Q. You couldn't take the defendant's roll and use it in connection [183] with the machine that is patented?

(Testimony of Arthur Jerome Kercher.)

A. I am not so certain about that. That might take a little addition of a cutting means but other than that it could be used in that machine.

Q. Without cutting it?

A. Without cutting it.

Q. I will give you a full opportunity to demonstrate to the Court how you can use the defendants' roll on Plaintiff's machine as the machine is illustrated in the patent. If you will do so I will be glad to have you do that, to demonstrate that to the Court, whether you could put the defendants' roll on the plaintiff's machine as shown in the patent.

A. I wouldn't attempt to demonstrate that, because I would have to add cutting means to cut the roll of cellophane here into sheets that would work in that particular machine.

Q. In other words, it could not be done?

A. It could be done, as I say, with the addition of the cutting means.

Q. Well, you have an opportunity to do it now if you can do it. This machine as presented in the patent merely solved the problem of making bags from pre-formed sheets.

A. As it is illustrated in the patent that is the only type of sheet that is used.

Q. It does not solve the problem of making bags from a roll?

A. It is perfectly obvious from the device——

(Testimony of Arthur Jerome Kercher.)

Q. I am not asking you what is perfectly obvious. I am asking you whether it solves the problem of making bags from a continuous roll without intermediate cutting.

A. It could not be done without the cutting.

Q. Could not be done. Now, Mr. Kercher, some of the claims call for a table; many of the claims, in fact, call for a table. What is a table for?

A. The table is just a means of support.

Q. A support for what?

A. To provide the working surface upon which this mandrel that is specified can be adjusted. I [184] will say it provides at least a mandrel or some means for pressing the seams of the bag together.

Q. Is that the object of the table?

A. That is the object of the table.

Q. What is the primary object?

A. It has the four legs, and it has a place there, and these other devices are placed on that table.

Q. What is the primary object of the table, the first thing you do about the table?

A. The primary object of the table is to provide a means of support for the operation that is to be done.

Q. It has nothing to do with the support of a sheet of paper or cellophane, has it?

A. In this case it does. It forms a table, or it forms a place—the sheet or material beneath the mandrel and the table, if there were no table there

(Testimony of Arthur Jerome Kercher.)

it wouldn't be possible to even support it unless it were supported with some other means on the edge, and it is my opinion the table is there to support the apparatus that supports the sheet of material under the mandrel.

Q. When you first place a sheet in that machine where do you place it?

A. You place it between the table and the mandrel.

Q. What supports the sheet? It is not hanging in mid air, is it?

A. The table under the mandrel, the plate under the mandrel supports it.

Q. Just what do you call a table?

A. Well, it has a surface that is generally supported by four legs to keep it a certain distance above the floor.

Q. Would you call this rail a table?

A. No. In that case it happens to be a guard rail. It has no flat surface on which you could support anything unless it were adapted to fit the flat surface.

Q. Would you call the rim of that chair a table?

A. No, sir, I [185] wouldn't call the rim of a chair a table. It could be arranged to be a table with some flat surface so that it would hold something.

Q. How do you come to call that little T that is shown in the defendants' machine a table?

A. It is a part of the table, in my opinion. The mere placing of a section of a table with a space

(Testimony of Arthur Jerome Kercher.)

around it and the entire part being supported by the frame, whether it is a table, it is a part of the table, and is equivalent to the table if the table had continuous flat plate all over it.

Q. Is it enough for a table in order to support a sheet of cellophane that it can be at least sufficient to support it?

A. It would have to be sufficient to support it.

Q. You would not call this rail, here, sufficient to support a piece of cellophane?

A. A sheet of cellophane. It would support it, but if you were—if you didn't care about its being folded down the side of it it certainly would support it.

The Court: It is twelve o'clock, so we will take an adjournment until two o'clock.

(A recess was here taken until two o'clock p. m.)

[186]

Afternoon Session—2:00 o'Clock.

ARTHUR JEROME KERCHER,

Recalled;

Cross Examination

(Resumed)

The Court: Proceed, gentlemen.

Mr. Schapp: Q. Mr. Kercher, this morning in our discussion we decided that it would be impossible to use a roller without previously cutting it on the plaintiff's machine as shown in the patent.

(Testimony of Arthur Jerome Kercher.)

Now, I will ask you another question: Would it be possible, in your opinion, to use one of the pre-formed sheets, such as are used in the plaintiff's device, and make a bag out of it on Defendants' machine?

A. Not with the feeding attachment that the defendants' machine has. You might make a different arrangement for feeding the material in there, and it would be possible to take a pre-formed sheet and put it in there and accomplish that result.

Q. If you changed the machine?

A. If you changed the machine.

Q. But the machine, as it stands, there, will it make a bag from a sheet of pre-formed material?

A. I would say that would be a rather impossible——

Q. Would it be possible?

A. Well, if the sheet were made long enough and it were started in the machine and brought into the end, which it is done in that instance, and the means for pulling the bag out were operated, it would be possible.

Q. Would it be possible with an ordinary sized sheet, such as used in an ordinary bag, with this machine? A. No, it would not.

Q. It would not? A. No.

Q. We discussed the question of the operating table, the table top on which the sheet is placed, and I will now ask you where you find in plaintiff's

(Testimony of Arthur Jerome Kercher.)

machine the equivalent of this table top [187] for positioning the sheet?

A. Are you referring to the indexes on the top? There are no indexes.

Q. Frame forming an operating table.

A. Oh, there is a frame forming an operating table.

Q. Where do you find the operating table in the defendants' machine?

A. I find it in the structure of the machine. The main structure of the machine is an operating table.

Q. Will you please point out what particular part you refer to as the operating table?

A. (Indicating) The operating table is the entire surface of this machine, including the part under the mandrel.

Q. Including the side pieces? You would include that in the expression "table top"?

A. That in the defendants' machine is a part of the top of the table. However, it is not used simply as a top of a table; it is used for other purposes.

Q. Is that used as the top of a table for the purpose of positioning any sheet of paper or cellophane in the defendants' machine?

A. In the defendants' machine the top of the table is not used for positioning the cellophane between the table and the mandrel.

Q. It is not used for that purpose; that is clear. I will refer you to Claim 2. The claim goes on to say:

(Testimony of Arthur Jerome Kercher.)

“A plate-like mandrel movably secured to said table.” Where do you find in defendants’ machine a plate-like mandrel movably secured to the table?

A. I find it in the defendants’ machine, a plate-like mandrel movably secured to the table through a system of structure on the end of the table.

Q. Where is it secured?

A. The plate-like mandrel is secured to this end of the table, here (indicating).

Q. Is it movable there?

A. It is movable—surely it is movable, because there is a part of it that is flexible, making [188] the other end movable.

Q. Is movable as a securing means?

A. In this case it is screwed up solid. I do not know that it moves there at all during the operation of the machine.

Q. You would say it is not movable at the securing means?

A. It is not movable at the securing means; it is movable between the securing means and the working part of the mandrel.

Q. That is a different feature. I am just asking you if we have a plate-like mandrel movably secured to the table. A. Yes.

Q. You pointed out it is not movable at the securing means. Isn’t that what the claim calls for?

A. I think I indicated in my testimony that mandrel is flexible, and while one end of it was rigidly fastened to a mechanism attached to the

(Testimony of Arthur Jerome Kercher.)

table, the other end could be moved up and down with relation to the table.

Q. We understand that part of your testimony, but still we insist that this claim calls for a mandrel movably secured, and a mandrel movably secured is not found independent of the device; you will agree with me on that, won't you?

A. I won't agree with you on that because the effect of that mandrel is, while it is solidly fastened on one end, it is flexible; it can move on the other hand, and the mere providing of a hinge on the back end of that thing is equivalent to making a section of it flexible. For instance, a pendulum swinging in a clock sometimes is rigidly fastened in the top, and part of that pendulum can be of resilient material which will permit the other end of the pendulum to swing. So the mere fact there is not a well-defined hinge there is no reason it is not movably secured.

Q. Isn't that what the claim calls for, movably secured? Didn't you say a moment ago it was fixedly secured?

A. I say the end, the part of the mandrel that is fastened to the machine is, [189] but between that and the operative function of the mandrel it is flexible.

Q. That is not the securing means, is it?

A. Well, if you look at it that way—I will admit the bolt on the thing can be tightened up and still the mandrel will be operative.

(Testimony of Arthur Jerome Kercher.)

Q. Let me ask you another question: Is there in the defendants' device this entire structure: "A plate-like mandrel movably secured to said table whereby a sheet of said material can be placed between one side of the mandrel and the table"? In defendants' machine is the mandrel used in that manner?

A. I would say that the mandrel is used in that manner where it is possible to place the sheet of material between the mandrel and the table.

Q. Do you move the mandrel when you put a sheet of paper into defendants' machine?

A. No. I don't think so.

Q. You do not?

A. It is not necessary to move the mandrel when you put it in.

Q. Do you believe it should move in the operation of the machine?

A. It moves in the operation of the machine.

Q. Is that what you showed in the motion picture? Isn't that purely incidental? It hasn't anything to do with the operation of the machine?

A. In my opinion it has something to do with the operation of the machine. If that mandrel were so placed that you could not put any cellophane between it and the machine, certainly you could not produce any bags on the machine.

Q. It does not move for the purpose of placing a sheet of material between the mandrel and the table, does it?

(Testimony of Arthur Jerome Kercher.)

A. It is placed there flexibly mounted on the table so a sheet of material can be placed under it, between the mandrel and the table.

Q. Would you say it has to be flexible?

A. I would say it has [190] to be more or less movable, because if it were not for that fact the mandrel would be pressed on top of the table, and then how would you get a sheet between the mandrel and the table?

Q. There might be a space in the table, might there not, without its being movable?

A. It could be, yes.

Q. So it does not have to move, does it?

A. In the defendants' machine it does have to move.

Q. It does not have to move by the slackness of a space of one thickness of cellophane, does it?

A. If it were accurately spaced— we are getting down to a hypothetical situation.

Q. I am trying to get down to a principle. In your machine, in the plaintiff's machine, this mandrel absolutely has to go up and down to clear the table for interposing a sheet of cellophane in each operation. Now, isn't that altogether different in defendants' machine?

A. I would say not, because it is not necessary that that mandrel rise for any considerable height in the plaintiff's machine. It is quite easy to slide a sheet of cellophane between that mandrel and

(Testimony of Arthur Jerome Kercher.)

the plate, even though it be held above the table only a small fraction of an inch.

Q. You are not willing to admit, then, there is a difference between the two machines in so far as the movement of the mandrel is concerned?

A. I admit that there is a difference in the two machines, and in the two machines as we have on exhibit here. In one case the mandrel lifts to a considerable height and in the other case it only moves slightly. That is the difference.

Q. Now, in the defendants' device is the mandrel moved for the insertion of the paper?

A. If it were not moved you could not put the paper under it.

Q. Why couldn't you?

A. Because the effect of the pressing on top of the completed bag would press that mandrel down on the table [191] and it would stay there, and how could you drag anything through there if it were pressed down and stayed there?

Q. As has already been pointed out, there could be a slight space in there.

A. There is a space in there.

Q. This claim goes on to say: "Means for folding the side margins of the sheet over the side edges of the mandrel." I first wish to call your attention to the words "of the sheet." What does that have reference to?

A. That means—wait a minute until I just look

(Testimony of Arthur Jerome Kercher.)

at that—"sheet" refers to the material that the bag is being made of, the cellophane.

Q. Any kind of sheet, or a particular sheet?

A. Well, it would be any kind of a sheet that could be folded over there. In this case the claim is limited to cellophane.

Q. Well, I am not referring to the material. If reference is made to a sheet, what sheet is referred to?

A. The sheet that is between the mandrel and the table.

Q. That has been previously positioned in accordance with the teachings of the previous sentence, isn't that it?

A. Well, that is all right, yes.

Q. That is all right. Now, "means for folding the side margins of the sheet over the side edges of the mandrel"—where do you find the side edges of the mandrel in plaintiff's machine?

A. The side edges of the mandrel are that portion of that plate of steel that is laid on top of the table, and over which the bag is folded.

Q. In the defendants' machine is the paper or the cellophane folded over the side edges of the mandrel?

A. It is folded over the side edges of the mandrel.

Q. Will you please point out where the folding takes place in the machine?

A. The folding takes place just at the edge [192] of the mandrel, at the end of it.

(Testimony of Arthur Jerome Kercher.)

Q. Isn't it a fact that the folding takes place over the end of the mandrel?

A. The folding in the one instance takes place over the end of the mandrel.

Q. Takes place over the end? A. Yes.

Q. Not over the side?

A. It is also folded over the side edges of the mandrel.

Q. As a matter of fact, the sheet is already folded before it reaches the side edges or at the time it reaches the side edges, isn't it?

A. Yes, it is folded. As I say, it is folded over that piece of material——

Q. It is folded over the end of the mandrel instead of the side edges?

A. I won't say that. Folding over the end of the mandrel does not indicate it is not folded over the side edges.

Q. Do the side edges have anything to do with the folding in defendants' machine? Could you eliminate the side edges and it would still be folded?

A. If you eliminate the side edges of the mandrel, it certainly would not be folded, because the machine would become inoperative. You have a mandrel there for that purpose.

Q. Is there any place besides the rear end of the mandrel where any folding takes place?

A. The folding takes place primarily under these inclined rollers that are back at the heating device.

Q. Isn't it a fact that the paper is folded first before it reached those rollers?

(Testimony of Arthur Jerome Kercher.)

A. Not as far as the production of the bag is concerned.

Q. You mean to say that the paper here at this place, right behind the rollers, here, is not folded?

A. It is folded over the top, but as far as making the bag is concerned, the rollers are the folding means, because they draw the sheet over the edges of the [193] mandrel. They tighten it and hold it.

Q. Do you mean to say it is folded here and the rollers fold it over again, or what?

A. No, I mean to say the rollers actually do the folding. Merely extending that sheet out over the end, in my opinion, does not nullify the effect of the elements in that claim.

Q. Mr. Kercher, how can the rollers do the folding if it is already folded?

A. The rollers cause the folding.

Q. It is folded before it reaches the rollers, is it not? Isn't this folded here behind the rollers?

A. The sheet is not folded as far as the bag is concerned behind the rollers——

Q. I don't know what you mean by as far as the bag is concerned.

A. Yes, the machine has to operate. What are the rollers put on there for? I will ask that question and perhaps that will answer your question.

Q. You are not cross-examining me; I am cross-examining you. Regardless of what those rollers are there for, you have to admit that it is folded over the rollers 180 degrees, isn't it?

(Testimony of Arthur Jerome Kercher.)

A. I say the rollers are the folding means of the sheet on that mandrel. The fold that you are talking about that is back of that is incidental to the effect of the rollers.

Q. Now, with reference to Claim 2, we have discussed the sheet which in the plaintiff's device has to be pre-formed, whereas a pre-formed sheet could not be used in the defendants' device. We have also discussed that the operating table in the plaintiff's device does not serve as a means for positioning a sheet of cellophane thereon. We have also discussed that the plate-like mandrel is not movably secured to the table, and we have shown that the sheet is folded before it reaches the side edges of the mandrel. Now, what is there left in that Claim 2 that the de- [194] fendants infringe?

Mr. Flehr: Mr. Schapp, I do not think we should confuse what the witness has said with your interpretation. You asked the witness certain questions with respect to the disclosure, which is perfectly all right, but let us not confuse the claim and your interpretation.

Mr. Schapp: Your Honor, is that an unfair question? I will withdraw the question.

(Discussion off the record.)

Mr. Schapp: Q. In Claim 3, the next claim, we again find the expression "sheet of material," and we again find the expression "of the working table"; we again find the "plate-like mandrel movably mounted," and we again find the expression

(Testimony of Arthur Jerome Kercher.)

“means for folding projecting side margins of the sheet over the side edges of the mandrel.” In addition to those we find the following expression here, which I would like to discuss a little further with you: “A retractable fold-line retaining means adapted to be interposed within the last-mentioned fold.” Do you find those fold-line retaining means on the defendants’ machine? A. I do.

Q. If you find those retractable folding means, are they retractable in the sense that they clear the mandrel for the operation of the heater?

A. They retract from the fold line.

Q. Will you please answer my question?

(The question was read by the reporter.)

A. No.

Mr. Schapp: Q. In other words, in the plaintiff’s machine the retractable folding means retract entirely from the mandrel to allow the heating to be performed in a single operation, whereas in the defendants’ machine the fold-line retaining means [195] remains on the mandrel, although it moves on the mandrel, is that the idea?

A. That is right.

Q. Now, we come to a discussion of Claim 5. Claim 5 again contains these limitations: “sheet material,” “a frame forming a working table,” “plate-like mandrel movably mounted . . . whereby a sheet of said material can be arranged”—and then it goes on: “with the sheet affording projecting side and end margins.” In the defendants’ machine, when the

(Testimony of Arthur Jerome Kercher.)

sheet is underneath the mandrel does it have any projecting side margins? A. Yes.

Q. Will you please point out where those projecting side margins are?

A. They are on the part that overlaps the end of the mandrel.

Q. I don't quite get that.

A. The short part of the sheet that has been folded over, that projects over the end of the mandrel.

Q. Over the end of the mandrel? A. Yes.

Q. Over the side, I mean. I have asked about side margins, not about end margin.

A. In the defendants' machine they have already been folded over the side margins.

Q. They have already been folded at that time; so there is no sheet of material arranged with projecting side margins at the time it is under the mandrel?

The Court: The record does not disclose any answer to the question.

(The question was read by the reporter.)

A. You definitely state a fact. I didn't know you asked me a question—at least what you thought was a fact. If you will ask me a question I will tell you whether I think it does or not.

Mr. Schapp: Q. Well, will you consider it as a question and [196] answer "Yes" or "No"?

A. The sheet of material is definitely extended over the end of the mandrel when the machine operates to produce a bag.

(Testimony of Arthur Jerome Kercher.)

Q. How about the side margins?

A. The side margins, as I said before, have already been folded over the mandrel.

Q. Now, in addition to these limitations, we now get into the subject of a heater: "A heater affording a substantially T-shaped heated area." Now, when you take that "substantially T-shaped heated area," what do you mean, or what does the patent mean, in your opinion?

A. The patent means the longitudinal seam and the seam across the bottom of the bag is the area that is supposed to be heated. The heater is substantially built to accomplish that—in other words, it is a heater designed in the shape of a "T" in which one part is at right angles to the other.

Q. Does the letter "T" have anything in particular to do with it as distinguished from a "V", a "U", or an "S"?

A. Well, a "T" is pertinent to this device because the method of making the bag, that is, it is necessary to fold the sheet over a mandrel for a longitudinal seam, and it is also necessary to fold the bottom over the mandrel to work a seam which is at right angles to that longitudinal seam, and, consequently, the heater has to be a T-shaped heater to accomplish that result.

Q. If it was off-set slightly it would an L-shape; that would be the same thing, wouldn't it?

A. I don't know whether it is ever made exactly in the center. It would be essentially a T if the

(Testimony of Arthur Jerome Kercher.)

longitudinal seam were placed somewhere within reasonable limits of the ends of the top member or the cross member.

Q. Isn't the principal idea of the T-shaped member that it correspond to the shape of the seam to be sealed? A. Yes, certainly. [197]

Q. That is the main idea? A. Certainly.

Q. Now, is the plaintiff's T-shaped member formed to cover the entire seam area?

A. It is made to cover the entire area with the exception of the notch that is left in it to provide for the fold-retaining means.

Mr. Flehr: Just a moment.

Mr. Schapp: I was talking about the plaintiff's machine.

Mr. Flehr: I think we are getting confused here. Which machine were you talking about?

Mr. Schapp: I was talking about the plaintiff's machine.

(The question was read by the reporter.)

A. Yes, practically the entire area.

Q. Could the T-shaped heater proposed by plaintiff be used on the defendants' machine in the operation thereof?

A. With slight modification it could, yes.

Q. I do not say with slight modifications; as the machine is? A. No, it could not be used.

Q. It could not be used? A. No.

Q. Why couldn't it be used?

A. Because the fold-retaining means would be in

(Testimony of Arthur Jerome Kercher.)

the way of a contact between the entire heating surface and the top of the mandrel.

Q. Will you please describe the heater used by the defendants?

A. Defendants' heater is a T-shaped heater in which there is a cross member designed to seal the bottom of the bag and a longitudinal member designed to seal the side seam on the bag.

The Court: Q. Two separate and distinct operations? A. Simultaneously in one operation.

Mr. Schapp: Q. Would you say that the defendants' heater could be used in the plaintiff's machine and make a salable bag?

A. With retractable fold retaining means it could. [198]

Q. It could not, or it could?

A. I say it could. It could be used.

Q. The defendants' heater could be used in the plaintiff's machine? A. And make a bag.

Q. And make a bag? A. Yes, sir.

Q. Wouldn't there be a gap in the seam?

A. There might be a gap in the seam; essentially it would be a bag. That gap is only a matter of distance, and in any instance that seam is not absolutely continuous, that it would be only a matter of reducing that gap and making that fold-retaining means very small, and you would have essentially the same thing.

Q. If it were all changed around to suit the purposes?

(Testimony of Arthur Jerome Kercher.)

A. I wouldn't say it was all changed around at all. It would simply be a matter of reducing the width of that fold-retaining means down to some reasonable limit.

Q. As it is used by the defendants at the present time it would not make a bag, a complete seal on the plaintiff's machine, would it?

A. It would not.

Q. In the defendants' machine does the heater make a complete bag in a single operation?

A. The heater makes the complete bag with successive operations.

Q. How many operations does it take to complete a bag?

A. It all depends on the size of the bag.

Q. Will you please explain that?

A. A very short bag in there that would be close-coupled could be made in two operations of the cycle of the machine, and after that it would take one operation of the machine.

Q. Are you quite sure about that?

A. I understand it fully. I know that if you cycle that machine once you can make a thousand bags with that machine without making only one extra operation in [199] a thousand.

Q. At the same time, in connection with each bag, doesn't it take two operations to make each bag?

A. In some instances it does; in other instances it does not. It depends on the size.

(Testimony of Arthur Jerome Kercher.)

The Court: Let us confine ourselves to the size here. Let us confine ourselves to what we have here.

The Witness: I would say if the machine is set up, it takes two impressions.

Mr. Schapp: Q. Two impressions?

A. Yes.

Q. As a matter of fact, is the heater continuous in the defendants' machine?

A. With the exception of the gap that is left in it, it is continuous.

Q. The gap is not continuous. Wouldn't you say there are really two heaters instead of one heater?

A. To my mind it is one heater. The whole thing is one heater, and merely moving the sections back and forth to that heater do not indicate to me it is evading the claim in the patent.

Q. But the heaters are spaced?

A. They are; they are spaced apart.

Q. Now, referring to Claim 8, Claim 8 again refers to the first limitation of a sheet of cellophane, plate-like mandrel, and then goes further into the mounting of the rear edge of the mandrel and says "means serving to pivotally connect the rear edge of said mandrel with said frame." Do you have that, Claim 8?

A. Yes, I have the claim.

Q. Do you find that pivotal mounting in defendants' machine?

A. I find the pivotal mounting in the machine.

Q. However, in the operation of the machine isn't it a fact that it is locked against pivotal movement?

(Testimony of Arthur Jerome Kercher.)

A. It is locked in move- [200] ment in this particular machine.

Q. In this claim, again, you talk about, or the patentee talks about means for folding projecting side margins of the sheet of material over the side edges of the mandrel. I think we have previously discussed that. A. Yes.

Q. And that there were no projecting side margins. But there is one feature here in this claim which, of course, contains all the other limitations, and that is the limitation in this claim which I wish to bring to your attention. It says: "Means for actuating said gripping bar to translate it into an elevated position overlying the forward edge of the mandrel, followed by lowering of the bar into engagement with the mandrel." Do you find the equivalent of that in the plaintiff's machine?

A. I do. I think that is demonstrated when the machine is in operation.

Q. Are you quite sure it contains these two features, first elevating it and then lowering it down?

A. Essentially that movement takes place in that machine.

Q. Isn't it rather a movement of climbing around the front of it without being first raised?

A. The machine I investigated indicated to me that that brought the end of it back up and over the end of the mandrel and held it in a position so that the heating element could seal it on the top of the mandrel.

(Testimony of Arthur Jerome Kercher.)

Q. Does it rise above the mandrel as described in the patent and then come down again, or climb over the edge of the mandrel?

A. I don't know. Certainly climbing over the edge of the mandrel, it must rise to get over it.

Q. By the way, let me ask you one more question: Are you quite sure in all these claims that the bottom edge or the front edge of the bag is folded over the mandrel?

A. I am positive that [201] the front edge of that is folded over the mandrel and over the fold-retaining means. This mandrel may be back of that a fraction of an inch, but nevertheless it is folded over the forward edge of the mandrel, because the joint that is sealed on there is sealed on top of the mandrel.

Q. But the actual folding does not take place over the mandrel, does it?

A. The folding takes place on the outside edge of the mandrel.

Q. On the outside edge of the mandrel. Now, we come to a discussion of Claim 14, which is the only method claim in the case, that is, the only one in issue, and this claim reads as follows:

“In a method for making bags from sheet material like cellophane, characterized by the use of a plate-like mandrel having a contour corresponding generally to the contour of the finished bag, arranging the sheet of material adjacent one side of the mandrel”——

(Testimony of Arthur Jerome Kercher.)

Do you find that in the defendants' machine?

A. I do.

Q. (Continuing) "successively folding the projecting side margins of the sheet through angles of substantially 180 degrees and over the side edges of the mandrel."

A. I find that.

Q. You do?

A. Yes, sir.

Q. I call your attention to the term used, "successively." Is this folding done after a sheet has been placed under the mandrel, after a sheet of material has been arranged adjacent one side of the mandrel?

A. It has, yes.

Q. Isn't it a fact that it is folded already after it has been placed adjacent one side of the mandrel?

A. It is folded over the side edges of the mandrel and one side is folded ahead of the other side.

Q. Mr. Kercher, you do not understand me right. We have a method [202] claim here, and this method claim recites a succession of steps, and, of course, the succession of steps would only be infringed by somebody else having a similar succession of steps, isn't that true?

Mr. Flehr: I object, your Honor, that is a conclusion of law.

The Court: The witness is an expert.

Mr. Flehr: That is an improper statement of law, your Honor.

The Court: What is improper about it?

Mr. Flehr: The law is to the contrary. The suc-

(Testimony of Arthur Jerome Kercher.)

cession of steps may be immaterial in a method claim, the exact sequence.

The Court: How are we to say at this time they are material or not material?

Mr. Flehr: I say it is a matter of law.

The Court: He is entitled to a record on it.

Mr. Flehr: All right, your Honor.

The Court: Objection overruled. (To the witness:) Did you follow the question?

The Witness: I followed the question.

Mr. Schapp: Q. Now, the defendants' machine——

The Court: Wait just a moment. He has not answered.

A. I will answer it this way: We arrange the sheet of material adjacent one side of the mandrel and we successively fold the projecting side margins of the sheet through angles substantially 180 degrees and over the side edges of the mandrel.

Q. Do you do all of that after you have placed the sheet adjacent to the mandrel?

A. We do all that after we have placed the sheet adjacent to the mandrel.

Q. Adjacent to one side of the mandrel, you say here. A. One side of the mandrel. [203]

Q. Isn't it a matter of fact by the time it reaches this side—you no doubt have in mind the bottom of the mandrel by saying one side of the mandrel, haven't you?

A. Adjacent one side of the mandrel, yes.

(Testimony of Arthur Jerome Kercher.)

Q. When you talk about one side of the mandrel, don't you have in mind the bottom of the mandrel?

A. I have in mind the bottom of the mandrel.

Q. After this sheet is arranged relatively adjacent to the bottom of the mandrel, thereafter do you go ahead and fold the side edges over 180 degrees?

A. Not by that method, but a method which is equivalent to it, in which the sheet is folded over the side of the mandrel back of the point that you illustrated on the mandrel. The sheet is arranged under the mandrel and the sides are successively folded over the edges of the mandrel.

Q. Is that done after placing the sheet underneath the mandrel?

A. It is done after placing of the sheet underneath the mandrel.

Q. Isn't it a fact that the side edges are folded over already when it reaches the bottom of the mandrel?

A. They are brought into a position where they can be folded over the mandrel.

Q. Now, Mr. Kercher, is there any time that any part of the sheet of cellophane lies under the mandrel, that is, turned from that position of 180 degrees?

A. It is turned, yes.

Q. Through a position of 180 degrees?

A. 180 degrees over the mandrel.

Q. Will you point out for me where it turned

(Testimony of Arthur Jerome Kercher.)

over to an angle of 180 degrees after it has reached the mandrel?

A. It turns over to a point 180 degrees when it leaves these rollers that fold it over the mandrel.

Q. Does it occupy 180 degrees already, the desired position already?

A. I wouldn't say it occupies a position of substantially 180 [204] degrees before it gets to that place.

Q. Isn't it a fact that right up at the beginning of the mandrel it occupies a certain angle relative to the mandrel? A. An angle, yes.

Q. After that can you still turn it 180 degrees?

A. It is only turned to 180 degrees after it passes under the rollers adapted to fold it under the top of the mandrel.

Q. Now, Mr. Kercher, I would like for you to read Claim 14 very carefully—in fact, I will read it to you—from the point of view of whether there is anything in this claim that is not the natural function of the machine. You realize, of course, that after you get a patent you can't get another patent on another claim on the function of that machine. There can be only one patent on the machine. If you want to get a process patent, you must define something other than what the machine actually does.

Mr. Flehr: Your Honor, I object again to this attempting to advise the witness what the law is.

The Court: I will have to allow for the heat of

(Testimony of Arthur Jerome Kercher.)

the battle and the anxiety of counsel to some degree. The form of the question is objectionable.

Mr. Schapp: All right.

Q. Regardless of the law on the question, I want to ask you now whether in this claim you find any step or any method which is not the mere obvious function of the machine? A. I do not.

The Court: Q. What is the answer?

A. I say, if I understand his question correctly, I do not find anything in the machine that is inconsistent with this claim and method of making bags.

Q. In what machine?

A. In either one of the machines. I do not find anything in either the defendants' machine or the plaintiff's machine that is inconsistent with this claim. [205]

Mr. Schapp: Q. You did not understand me right. I am not asking you anything about being inconsistent; I just asked you whether this claim defines any kind of a step or method that is not automatically carried out by the machine.

The Court: By what machine?

Mr. Schapp: By the plaintiff's machine.

A. No.

Q. There is nothing in this claim that the machine does not automatically do?

A. The machine does all of these things.

Mr. Schapp: I merely show this for the purpose, your Honor, because going into the law we will find

(Testimony of Arthur Jerome Kercher.)

a method claim merely defines the function of the machine.

Q. We will come to Claim 18, which apparently has been considered one of the more important claims by the plaintiff, and which probably is the broadest claim. This claim defines a mandrel and then it says, "Means for folding over side and bottom margins of the sheet over the mandrel through angles of substantially 180 degrees." We went into this before. I do not know whether we have to go into it again, but I want to ask you once more whether in the defendants' device you find any means for folding over side margins—I am not relating to the bottom margins now—the side margins of this sheet over the mandrel through angles of substantially 180 degrees?

A. Yes, I find those means there.

Q. Do you mean to say that the sheet is folded while it is being run over the mandrels to an angle of 180 degrees?

A. The machine incorporated the means for folding this sheet over the mandrel, the side margins being folded over approximately 180 degree.

Q. While it is over the mandrel?

A. While the sheet is folded [206] over the mandrel, there means fold the sheet over the mandrel at substantially 180 degrees.

Q. What I am asking now is in your machine do you understand the sheet of paper first lies flat?

A. Yes.

(Testimony of Arthur Jerome Kercher.)

Q. The mandrel is placed on top?

A. Yes.

Q. And then you fold one side over 180 degrees and then you fold the other side over 180 degrees. Is there such a folding over the mandrel in the defendants' machine through an angle of 180 degrees?

A. You have an equivalent means for folding it over.

Q. You call it an equivalent? A. Yes.

Q. But it is not the same. Then a heater having a similar T-shaped heated surface. We have discussed that already, and I do not know whether it is necessary to go into that again.

The Court: We will take a recess for a few minutes.

(Thereupon a brief recess was taken.)

The Court: Proceed, gentlemen.

Mr. Schapp: If your Honor please, there is one more claim, Claim No. 19, to be discussed, but this claim seems to contain all the limitations that have already been discussed, and I do not see any necessity for taking up any time on that.

The Court: Very well.

Mr. Schapp: At this time I desire to introduce in evidence a number of patents which form part of the prior art.

Mr. Flehr: Mr. Schapp, they have all been cited in the answer?

Mr. Schapp: They have all been cited in the answer, yes.

(Testimony of Arthur Jerome Kercher.)

Mr. Flehr: You are inserting all the patents which have been cited?

Mr. Schapp: Yes. Hotchkiss, No. 135,275, on paper bag machines, granted 1873. [207]

Beyer, No. 251,402, on a paper bag machine, patented December 27, 1881.

Hunt, No. 515,121, on a method of making bags, patented February 20, 1894.

Hesser, No. 1,020,821, on a machine for automatically making paper packets, patented March 19, 1912.

Johnson, No. 1,368,633, on a method of making carton linings, patented February 15, 1921.

Corse, No. 1,703,723, on a bag making machine of February 26, 1929.

Becker, No. 1,780,142, on a method of packaging articles, October 28, 1930.

Munson, No. 1,953,122, on an apparatus for the manufacture of containers from cellulose sheets, dated April 3, 1934.

Cooley, No. 1,973,406, on a cup making machine, dated September 11, 1934.

I am offering these as a single exhibit, I suppose.

The Court: Very well.

Mr. Schapp: I offer these in evidence and ask that they be marked "Defendants' Exhibit B."

(The documents in question were thereupon marked "Defendants' Exhibit B.")

(Testimony of Arthur Jerome Kercher.)

Mr. Schapp: If your Honor please, unfortunately I was unable to get a copy of one of the patents from the Patent Office, because they were out of copies, and I had to incorporate my own copy, which had been marked somewhat, and I ask permission as soon as I get the copy from the Patent Office to substitute it for my copy.

(Mr. Flehr handed a copy of the desired patent to Mr. Schapp.)

Mr. Schapp: Thank you very much. [208]

Q. Mr. Kercher, I understood you to say during your direct testimony that you have familiarized yourself with the prior art, and that after studying the prior art you had come to the conclusion that the claims in which you were not anticipated are shown in the prior art, is that correct?

A. That is correct.

Q. Running across the prior art, you no doubt also have paid particular attention to the patent to Beyer, No. 251,402, patented December 27, 1881?

A. I have.

Mr. Schapp: For your Honor's convenience, I have made enlarged prints of some of the drawings. This is an enlargement of Fig. 1 of the Beyer patent, and this is an enlargement of Fig. 2 of the same patent.

Mr. Flehr: They are photostats?

Mr. Schapp: They are photostats, yes.

Q. Now, Mr. Kercher, I will ask you to describe the Beyer patent to the Court, if you will.

(Testimony of Arthur Jerome Kercher.)

A. The Beyer patent is a bag making machine. The patent refers to that as the invention that "relates to certain improvements in that class of machines used for making paper bags; and it consists in an improved construction of the forming and folding plates, and in the addition and application to the general operation of folding the paper into bags of a novel means for pasting the bags, and also for printing any desired design or label thereon."

Q. Could you step up to the drawing, there, and explain by means of the drawing what the construction of that patent is?

A. In this drawing, the one of the Beyer patent—in Fig. 1, we have a table-like member consisting of a table top and legs supporting top. Arranged on the top of this table is a plate-like arrangement called a mandrel or a forming plate. That is [209] hinged at one end and it is arranged so that it will move up and down by reason of a pedal that the operator might put his foot on. On this same device there are arranged plates marked "K" on the drawing and "F" on the drawing, which are adapted to be slidably mounted. It does not indicate on the drawing just how they are mounted, but anyway it is indicated they are moved in and out over the top of the plate B when the plate B is depressed and laid on top of the table.

We also have in connection with this folding means on one side the pasting pot, and arrange-

(Testimony of Arthur Jerome Kercher.)

ments for applying paste to the material that they might wish to fold. On the end of this mandrel or this plate, at that edge of the material, is also slidably mounted a kind of weight-like structure on which is mounted a pasting device, and that is arranged to be slidably mounted or horizontally with the plates that are on the side of the machine.

Briefly, this whole set-up operates in a cycle. While the means are relatively crude, the parts are not adjusted like one would adjust them to-day, still the machine from that standpoint is operative. The operator putting his foot on here (indicating), first causes the plate to descend on the table. Next these side plates are moved in and a pasting operation takes place on the side of the folder, and that is folded over and the sides are pasted over the top of that mandrel on the top of the machine. Then the portion that extends over the end of the mandrel is pasted. It not only extends over the end of the mandrel, but over this weight structure with the roller on it, it is pasted, and in the operation of the machine that pushes the material over the end of the mandrel, and that is their method of making a bag.

Q. In the general construction and operation, isn't that machine [210] organized substantially the same as the plaintiff's machine as shown in the patent?

A. It operates in somewhat similar manner, but there are essential elements in the patent which are not present in that machine.

(Testimony of Arthur Jerome Kercher.)

Q. Now, Mr. Kercher, to take the simplest case, let us first take this model—is that the Model 2? Plaintiff's Exhibit 2, or what was it? A. 3.

Q. Plaintiff's Exhibit 3, which is the simplest one.

The Court: With the wooden legs.

Mr. Schapp: Q. Yes. Isn't that substantially a picture or a copy of the Beyer patent?

A. I would say not.

Q. Will you point out any distinctive features that you can see?

A. In the first place, in this device we have no pasting means, or means for applying an adhesive to the paper that is put into the machine. Secondly, we have no retractable folding means that will present the bag to be folded over the end of the mandrel. And in the third place, we have no means for holding that bag as it is folded over the mandrel, so that a heating device can be placed on top of the mandrel and seal the bag.

Q. Apart from that the operation is the same?

A. The function of the folding part, the mandrel and the rest of it, is the same.

Q. Don't you use any glue in sealing the bag?

A. What bag do you have reference to?

Q. In the plaintiff's bag.

A. The cellophane is coated with material that is adhesive when it is heated.

(Testimony of Arthur Jerome Kercher.)

Q. That is, the coating material takes the place of the glue? A. Yes.

Q. And that coating material is applied at some time?

A. Not for the purpose of gluing, but for the purpose of keeping out the moisture. [211]

Q. Yes, but it happens to have gluing properties when it is heated.

The Court: That is uniform through the cellophane.

Mr. Schapp: Yes, that is uniform through the cellophane.

Q. In the Beyer patent do you apply pressure for gluing the edges and the seams?

A. Only the effect of the folding blade that slides over the top of the mandrel. Presumably the paste, when Beyer designed the machine, he had some paste that was reasonably thick and it did not take much pressure to stick it.

The Court: Q. The word "pressure" is often used here. What do you mean when you use that word "pressure"?

A. In referring to pressure in this machine there is a definite vertical force that presses these heating elements on the mandrel and against the top of the machine.

Q. Contact?

A. Contact and pressure. There is a definite pressure put on it.

(Testimony of Arthur Jerome Kercher.)

Mr. Schapp: Q. Isn't the same contact pressure used in the Beyer patent?

A. Not on the edges of the device.

Q. Do you remember the description of the Beyer patent, whether it says anything about applying pressure to the seams?

A. No, I have not referred to that. It refers to the roller arrangement that is adjusted on the end fold to roll the glued seam together.

Q. As a matter of information, I might read this part of the patent to the Court.

Mr. Flehr: Where are you quoting from?

Mr. Schapp: This is reading from the patent, page 2, column 1, line 65:

“The lever H is next acted upon, and as the tension is brought upon the cord 1 the paster J descends and deposits paste upon the [212] edge of the paper, which is then folded over upon the other side by the sliding plate E and pressed down. The strap M is then drawn tight, and the end plate L slides forward, its paster acting at once, and the end of the paper is folded over and rolled down by the rollers of the plate.”

Q. That seems to indicate that pressure is applied to seal the seams.

A. No doubt—it would seem to me in that connection those side plates must have some weight because there is no means supplied in the machine for the operator to press that joint.

(Testimony of Arthur Jerome Kercher.)

Q. Now, I wish to call your attention to another patent.

The Court: You have testimony with relation to those charts. You had better introduce them in evidence. You have already examined him on them.

Mr. Schapp: I desire to introduce in evidence these two photostatic copies of the Beyer patent and ask that the same be marked Defendants' Exhibits C and D.

(The charts in question were thereupon received in evidence and marked, respectively, Defendants' Exhibits C and D.)

Mr. Schapp: Q. Now, I wish to refer you to the Hunt patent, which has already been offered in evidence, and refer you to a large photostatic copy of it.

Mr. Flehr: Why not put that in evidence now?

Mr. Schapp: I will ask you to explain this Hunt patent to the Court.

The Court: Talk so the reporter will be able to get it.

A. This is a method patent, a method of making bags, and the method is indicated on the drawings in the patent. We have Figs. 1 to 7. In Fig. 1 a sheet of paper is presumably cut out into a rectangular shape. This sheet is folded about a block B, [213] and it is adjusted on there by a device which would keep it in alignment on the block. A portion of this sheet extends over the top of the block, and then the patent recites that a means are used for

(Testimony of Arthur Jerome Kercher.)

holding that by hand similar to the means for folding a package in the store—in other words, you make an inter-fold. You fold the two ends together and then fold the sides over, making what we call an inter-fold on the end of a package. This paper before it was folded around here, it was coated with a wax compound, presumably to make it moisture-proof, and at the same time to provide adhesive. Now, this wax compound at that time was material that had a relatively high specific heat and had a low thermal conductivity, so that it did not cool instantly, and in the patent the patentee recites he uses a water-cooled block in order that the block will not get hot in the process of sealing it. He provides water flowing in one side and out the other side, maintaining a cooled surface on the block, and for a sealing operation he has a heater which covers a portion of the overlap, and on the side of that heater he has an extension which is presumed to seal the side of this box simultaneously. It is a heater that is simply a chunk of iron which he heated from a gas fire. He has indicated in the patent there are little projections on the side of it, and because it is hot, undoubtedly they use a handle or some kind of mechanism to lift it up, place it on here, and lift it off again, so sealing the bottom of this box or bag.

Now, it recites in the patent, and it is evident that they had to maintain this block cold. The discrepancy in the invention, as I see it, from the prac-

(Testimony of Arthur Jerome Kercher.)

tical standpoint, is he provides no holding means on this folded edge in order to keep them together during the time he lifts off the heater and the time that [214] wax will seal it.

The Court: Probably it is a good heavy piece of iron.

Mr. Schapp: Q. Referring to the shape of that heater, there, what would you call the shape of that heater to be?

A. Well, it is a heater which has fastened on the side of it, as indicated by the Fig. 6 and Fig. 7, an extension and side piece, which he indicates is adapted to heat up at least the side of that folding member and melt the wax, which presumably, if it held long enough, would stick together.

The Court: Is that the 1894 patent, or 1881?

Mr. Schapp: 1894.

The Court: They might have thought as well of that then in those days as we do now of some of our modern things. We laugh now at some of those things, but they were a step forward at that time.

Mr. Schapp: Q. Since we have been talking about letters of the alphabet in connection with heaters, I wonder if the heater as shown in Fig. 7 here reminds you of any letter of the alphabet?

A. Well, as indicated on the drawing, in one instance, depending on the way you look at it, it might be an "L", but you would have to turn the paper over and look at it from the back side.

(Testimony of Arthur Jerome Kercher.)

Q. Calling your attention to Fig. 6, does that remind you of any particular letter of the alphabet?

A. That elevation of the element would indicate it was somewhat T-shaped.

Q. Somewhat T-shaped at least. Isn't that "T" shown in the Hunt patent? Does that "T" shown in the Hunt patent look just the same as the "T" in the plaintiff's patent?

A. I never look at a thing from an elevation. I have to look at it from the other side. In doing that I would not agree with you. [215]

Q. Is this entire surface here heated, the T-shaped surface in the Hunt patent?

A. At least we have no visual evidence on the patent that the entire top of it was heated. However, I would assume that a considerable portion of it would be heated.

Mr. Schapp: Now, your Honor, I will not go through all the claims again, because this is getting rather tiresome, but I would like to go through a single claim and show how the Beyer patent is practically covered by Claim 2 in the Plaintiff's patent, that there is very little difference between the definition of Claim 2 and the Beyer patent. May I use the Beyer patent?

Q. Now, referring to the Beyer patent, and reading from Claim 2, I will ask you whether you do not find most of these elements in the Beyer patent:

"In a machine of the character described for the manufacture of paper bags from sheet material like cellophane——"

(Testimony of Arthur Jerome Kercher.)

A. Yes.

Q. Of course, cellophane is not used in the Beyer patent. Do you find a frame in the Beyer patent?

A. I do.

Q. Forming an operating table?

A. Yes, sir.

Q. A plate-like mandrel? A. I do.

Q. Do you find a plate-like mandrel?

A. Yes, sir.

Q. "movably secured to said table whereby a sheet of said material can be placed between one side of the mandrel and the table"—

A. It does.

Q. Does it show means for folding the side margins of the sheet over the side edges of the mandrel?

A. It does.

Q. Does it show means for folding a projecting end margin of the sheet over one end edge of the mandrel?

A. Not in the sense that Beyer has indicated in his patent. There are means for folding the part that might project, the part of the paper that might [216] project over the end of the mandrel, but there is involved something else there for folding that over, and that is a fold-retaining means. He hasn't got that on his machine.

The Court: Q. A what?

A. A fold-retaining means.

Q. A fold-retaining—

A. A retaining bar.

(Testimony of Arthur Jerome Kercher.)

Q. One that goes into each side?

A. Yes. I can illustrate it on this machine by that part that moves across the top of the plate when the bottom is folded over.

Mr. Schapp: Q. Does this claim call for a fold-retaining means?

A. No, but it indicates that the machine has to be operated by reason of the fact that it is folded over.

Q. Do you mean to indicate that Claim 2 would not be infringed by anybody regardless of anything else if they had the fold-retaining means?

A. No, one other thing in the claim: means for applying a heated surface under pressure.

Q. We haven't got that far yet. "Means for folding a projecting end margin of the sheet over one end edge of the mandrel."

Mr. Flehr: Mr. Schapp, you asked a question which I believe is improper, but it has been passed.

Mr. Schapp: My last question was, "Means for folding a projecting end margin of the sheet over one end edge of the mandrel."

Mr. Flehr: What is the question?

Mr. Schapp: Q. Does it show that? Does the Beyer patent show that?

A. Yes, it shows that.

Q. Now, I will ask the last element of the claim: "Means for applying a heated surface under pressure to overlapping portions of the side margins and to the end margin along an area where the end

(Testimony of Arthur Jerome Kercher.)

margin overlaps the side margins." Does the Beyer patent show that?

A. The Beyer patent does not show that. [217]

Q. What part of this last sentence is absent from the Beyer patent?

A. There is no means for applying heat over the end margins or the side margins.

Q. No means for applying heat?

A. No, no heated surface.

Q. Apart from the heat, does it contain everything else?

A. No, it does not. It does not contain everything else. I doubt very much in the Beyer patent whether you could even apply pressure on the side margins and the end margins without adding a lot more to the design of the machine.

Q. It would depend on the weight of the plates, probably, wouldn't it?

A. Not only that, but it would necessitate a readjustment of the device—in other words, a different invention.

Q. Doesn't the description call for applied pressure in the Beyer patent?

A. It does not call for applying any pressure. There is nothing indicating any pressure in the Beyer patent, there is no method by which any pressure is applied with the exception of possibly the weight of the plate which slides over the block.

Q. The weight of the plate, itself, would apply pressure, wouldn't it?

A. To a certain extent.

(Testimony of Arthur Jerome Kercher.)

Q. You are ready to admit, then, that every element in Claim 2 is shown by the Beyer patent except the last one?

A. The last one is certainly not there.

Q. And in the last one you are probably willing to admit that any plate lying over those seams would apply some pressure, depending, at least, on the weight of the *the* plate?

A. I can't conceive of that being done on that machine, because of the construction of the machine and because of the fact that after these edges were folded and heat is applied, and it is applied simultaneously and not in succession—in other words, in this patent the seam is sealed first and then the end is sealed. [218]

Q. Does Beyer provide a T-shaped seam when he gets through?

A. He does not. He has a T-shaped seam on the bag, yes. I will correct that.

Mr. Schapp: That is all. I desire to introduce in evidence photostatic copy of the Hunt patent and ask that the same be marked.

The Court: It will be admitted next in order.

(The document in question was thereupon received in evidence and marked "Defendants' Exhibit E.")

Redirect Examination

Mr. Flehr: Q. Now, Mr. Kercher, I believe you have referred to this part upon Defendants' Exhibit

(Testimony of Arthur Jerome Kercher.)

A (indicating). Would you again tell me what is the prime function of that part on Defendants' Exhibit A?

A. The function of this cross member that lays over the end of the mandrel on Exhibit A is put there to provide a folding edge so that the bottom of the extended portion of the bag that is formed over the mandrel can be folded back over the mandrel.

Q. Is it necessary to have that part?

A. It is essential and necessary that that part be there.

Q. Would the machine operate now when I take that part away? A. No.

Q. Why is it necessary?

A. Because a part of the bag is under the mandrel—it is obvious that that part of the bag that is under the mandrel would be folded over the mandrel, and would be folded very successfully, but that part of the bag that lies on top of the mandrel would not be folded in a line. That device is put there so that there is a simultaneous line folded in the bottom of the bag together with the top of the bag, over on the top of the bag. [219]

Q. By taking a piece of paper or cellophane would you demonstrate to the Court what you mean by the part above the mandrel?

A. (Indicating) Assuming that this is the mandrel, the cellophane is placed under the mandrel. The sides are successively folded over the top

(Testimony of Arthur Jerome Kercher.)

of the mandrel. Now, when I resort to the part of the bag that is above the mandrel, I am referring to this bottom part (indicating), and when I am referring to the part that is on top of the mandrel, I am referring to the part that is folded over the mandrel. Now, it is obvious that if a fold-retaining means were not placed in that position, that that bag would not fold over. It is necessary that some means be provided along this upper edge of this thing so that this fold can be folded over, and then it is necessary to retract this in order that the heater may come down and seal it.

Q. Mr. Kercher, this bar, then, is such a means upon Defendants' Exhibit A? A. It is.

Q. Do you find anything comparable to such a bar or member in the Beyer patent?

A. I do not.

Q. Then would you say that the Beyer patent would be operable if it used such a sheet as is folded in either Plaintiff's Exhibit 4 or Defendants' Exhibit A? A. It would not operate.

Q. In other words, as I understand your testimony, that is a simple means to fold over the mandrel, and there is no part comparable to this bar upon Defendants' Exhibit A to retain the folder for the upper part of the cellophane?

A. That is correct, or the paper, whichever the case may be.

Q. By the way, Mr. Kercher, do you find any place in the prior art anything which if utilized in

(Testimony of Arthur Jerome Kercher.)

a bag-making machine and which serves this function of retaining the fold line?

A. There is nothing I have been able to discover in the prior art. [220]

Q. Mr. Kercher, have you ever seen a machine like Plaintiff's Exhibit 4 operate for the purpose of manufacturing bags with a notch in the portion of the heater? A. I have.

Q. Who operated the machine in that way?

A. I think Mr. Gaubert.

Q. And he did successfully make bags that were sealed by that type of heater, did he not?

A. He made bags that were—in fact, I have some of them.

Q. We will put on a demonstration of that later.

Mr. Kircher, have you had prepared under your supervision a drawing to illustrate the end folding means of Defendants' Exhibit A?

A. I have.

Q. Can you identify this drawing?

A. I can. It was made under my direction.

Q. Will you describe generally what it shows?

A. This drawing shows the device for successively raising up and folding over the end of the mandrel that part of the bag that projects over the end of the mandrel when it is being formed. This drawing, as laid out, indicates that the folding member, or that part of it, comes in contact with the bag and successively moves upward, folds the edge of the bag over the top of the mandrel,

(Testimony of Arthur Jerome Kercher.)

and then down, holding it in such a position that when the heater comes down it can seal it.

Q. The letters upon this drawing, Mr. Kercher, are the same as the letters employed on Plaintiff's Exhibit 11, is that not correct? A. Yes.

Q. Just to make this clear in the record, what is illustrated by the red ink?

A. The red ink shows the cellophane bag or the end of the bag being formed over the fold retaining means which is marked "F", which is upon the top of the mandrel marked "B". [221]

Q. What does this black dash-dot line with arrows represent?

A. That represents successive points along which the edge of that folding means travels in its operation.

Q. In other words, it indicates the path of movement of the end tip of the folding member D, is that correct? A. That is correct.

Mr. Flehr: I offer in evidence the drawing which the witness has identified, the same to be marked "Plaintiff's Exhibit 20."

(The document in question was thereupon received in evidence and marked "Plaintiff's Exhibit 20.")

Mr. Flehr: Q. Now, does this Defendants' Exhibit 20 show that the member D first moves in a vertical position and then moves into a position down upon the mandrel, down towards the mandrel?

(Testimony of Arthur Jerome Kercher.)

A. It does.

Q. Now, Mr. Kercher, the method of Claim 14—in your opinion can the steps of that method be carried out by hand instead of being carried out by a machine? A. They can.

Q. And you have seen them carried out by hand, have you? A. I have.

Q. In other words, it does not take a complete machine of this sort to carry out that method?

A. It does not.

Q. That is, of the sort of Plaintiff's Exhibit 4 and Defendants' Exhibit A. Now, with respect to the Hunt patent, Defendants' Exhibit E, will you point out the surface of that heater, which is the surface which contacts the wax paper?

A. The surface of this heater that contacts the wax paper is not shown in plan, but is shown in the line on the side in Fig. 7, the line extending from left to right and then downward on that side.

Q. In other words, that heater has a top part which extends entirely over the end of the block and then it has a leg marked by a letter d2, which extends down one side, is that right? [222]

A. That is right.

Q. This surface, here, to which I am pointing, is that surface used in the heating operation?

A. That is not used, the surface opposite to that one is used on the heat operation.

Q. In making an inter-fold bottom like that, Mr. Kercher, is that a comparably simple folding

(Testimony of Arthur Jerome Kercher.)

operation, or, compared to the folding carried out in Plaintiff's Exhibit 4, is it a complicated folding operation?

A. From the standpoint of the machine it is more complicated, because it involves two or more distinct operations. In other words, the sides have to be folded in and they may be folded simultaneously, and then the ends can be folded over the other way after the sides have been folded in.

Q. In making an inter-fold bottom such as is shown in Fig. 5, do you have portions of that bottom which represent overlap areas and also portions which represent a single thickness of the paper? A. Yes.

Q. Will you point out the portions which represent an overlap?

A. The portions which represent an overlap are a line that would be defined across the corner to the edge of the sheet, here, also on all of the edges—in other words, there are portions of that that are folded in. It is quite obvious to understand that from the standpoint of the ordinary bag or loaf of bread, these devices here that fold over in substantially the same way (indicating).

Q. Mr. Kercher, then is it correct that when this heater is placed over such a folded piece of wax paper, that the heat would be applied not only to the overlapping portions, but also to portions of a substantial size of single thickness of paper? Is that correct? A. It would.

Mr. Flehr: That is all. [223]

(Testimony of Arthur Jerome Kercher.)

Recross Examination

Mr. Schapp: Q. I would just like to ask you one more question, Mr. Kercher: I understand you are a man of considerable ingenuity. You are the inventor of a hundred different patents or more. When you demonstrated to his Honor that this fold could not be made, does not your inventor's ingenuity suggest any idea for that fold to be very easily made on that same machine?

A. It could be made if there was some device down here to crease it.

Q. Without any change in the machine?

A. It would of necessity involve a bar across here in order that there might be a fold line on the inside.

Q. Now, assuming, Mr. Kercher, if this cellophane were cut to a size, like most cellophane is, and this portion were cut out, so you would only have a single layer there, wouldn't it be very simple to fold that bottom layer?

The Court: You give us a demonstration. You do it.

Mr. Schapp: I will have to cut this sheet. I merely want to point out the difficulty of adjusting this mandrel, which is necessary in making this fold.

The Court: Instead of cutting it out, pull it out.

Mr. Schapp: If this sheet were pre-formed like this——

(Testimony of Arthur Jerome Kercher.)

The Court: Is that the way it is?

Mr. Schapp: Well, that is the way it could be worked.

The Court: It could be, but——

Mr. Schapp: It is not the sheet, you see. You have to use imagination on what kind of sheet you want to use, but there is no reason why you could not use this kind of sheet.

The Court: You are getting me into the realm of speculation, and I will have to have an awful imagination to go back to 1894 [224] and figure— Well, go ahead.

Mr. Schapp: The paper is folded like that, a pre-formed sheet like this—a pre-formed sheet used no doubt—it would be folded over once, fold over the other, and then by means of this blade, folded over this way.

The Court: Get that figured out, will you?

Mr. Schapp: If this edge were cut straight here, and this is laid down, there is no reason it should not be folded over like this without any change in the machine, and having a proper sheet of paper, which, of course, is assumed, a proper sheet of paper is to be used.

The Court: It is now four o'clock. We will adjourn until ten o'clock tomorrow morning.

(An adjournment was here taken until tomorrow, Friday, November 8, 1940, at ten o'clock a.m.)

Friday, November 8, 1940—10 o'clock A. M.

ARTHUR JEROME KERCHER,

Recalled.

Recross Examination

(Resumed)

Mr. Schapp: Q. Mr. Kercher, the plaintiff apparently tries to create the impression that he was the first one to use the process of heat sealing in connection with moisture-proof cellophane. Do you agree with plaintiff on that?

Mr. Flehr: I object to that question as being a misstatement of fact.

The Court: What is the fact? Develop the fact, whatever it may be.

Mr. Schapp: Q. After you have studied the prior art do you know of any prior uses of the process of applying heat sealing to moisture-proof cellophane bags? A. Yes.

Q. I call your attention to the patent of Becker which was issued in 1930, No. 1,780,142, and I will ask you to read to his Honor the first paragraph of that patent.

A. "The present invention relates to the packaging or wrapping of articles in moisture-proof containers, usually of cellulose sheet material, particular regenerated cellulose which is known in the trade as 'Cellophane.' While the invention is particularly illustrated and will be described for the packaging of cigars, it is adapted and may be used for the packaging of a large variety of articles."

(Testimony of Arthur Jerome Kercher.)

Q. Thank you. I will ask you to read into the record the third paragraph of the same patent.

A. "The material used is preferably of the waterproof variety of 'Cellophane' which is coated with a light covering of paraffine which is fusible, and upon the application of heat and pres- [226] sure will seal the surfaces of the sheet together. The invention, therefore, proposes the use of a hot sealing and pressing operation which adhesively secures the material together."

Q. Thank you. Now, I also want to call your attention to the patent of Munson, No. 1,953,122, granted on April 3, 1934, on an application filed November 11, 1929, that was about five years before the plaintiff entered upon the scene, and I will ask you to read into the record the first sentence of that patent.

A. "The present invention relates to the manufacture of containers from webs or rolls of sheet material and particularly transparent cellulose sheeting."

Q. I also ask you to read from lines 25 to 36, inclusive.

A. "To render sheet cellulose of this type moisture-proof, it is generally coated with a thin transparent layer of a moisture-proofing composition. Such a coating upon the cellulose sheet presents other and new difficulties, including bonding and handling of the web in the making of containers therefrom. It has been found advantageous to use

(Testimony of Arthur Jerome Kercher.)

heat in bonding the folded portions of the container together, and it is one of the problems encountered in dealing with this material to incorporate heat-sealing units in an automatic container-forming machine.”

Q. Now, I will ask you to read that paragraph beginning with line 45.

A. “A more particular object of the invention resides in providing automatically-operating heat-sealing means on the container-forming machine.”

Mr. Schapp: Thank you. That is all, Mr. Kercher.

Further Redirect Examination

Mr. Flehr: Q. Mr. Kercher, referring to the Becker patent concerning which you have just testified, it is among Defendants’ [227] Exhibit B—Can I take these apart, Mr. Schapp?

Mr. Schapp: Surely.

The Court: Identify them for the purpose of the record.

Mr. Flehr: The number of the patents, your Honor, do you mean?

The Court: Whatever you are doing, so the record will show it.

Mr. Flehr: The Becker patent, No. 1,780,142.

The Witness: Munson, Corse, Johnson, Hesser, Cooley, Beyer, Becker.

Mr. Flehr: Q. Now that you have found that patent among Defendants’ Exhibit B, would you

(Testimony of Arthur Jerome Kercher.)

please point out what is disclosed in that patent other than what you have read from the patent?

A. "The container or wrapping produced by the method herein described is neat and attractive in appearance because of its glossy appearance and, in addition, keeps the articles wrapped and displayed therein fresh and in good condition, the articles being visible at all times through the wrapping material."

Q. I think you misunderstood me. What I want you to do is describe generally what the patent shows.

A. The invention shows a roll of cellophane material which has previously been formed into a tube of considerable length. This tube is rolled on an arbor and is pressed through the machine whereby it is cut into length. These lengths are impressed into rollers with a kind of a fold or seam, a groove, as it were, a line that would help the bending of the end of the piece cut.

Q. You have reference to rolls 15?

A. Rolls 15, yes.

Q. Then what happens to the material?

A. This material is then pushed through a folding device which consists of two plates marked 17 and 16 in the patent. It then passes through two rolls marked 18, which press the folds over tightly together. [228]

Q. Do you refer to an end fold now?

(Testimony of Arthur Jerome Kercher.)

A. To the end fold, yes. This is then successively passed between rollers which apply heat.

Q. Those are the rollers 20?

A. 20. The rollers 20, which have heating elements marked 21. Then it is passed between rollers marked 24 in which it is then passed into a mandrel for expanding it so the cigars can be placed in it.

Q. In other words, this machine is intended primarily for making small cellophane containers for cigars?

A. Yes.

Q. The sealing operation carried out by the rollers 20, would you tell me what part of the bag is sealed by those rollers?

A. The bottom of the bag.

Q. Is it a seal like either Plaintiff's Exhibit 8 or Plaintiff's Exhibit 15?

A. No, it is not.

Q. What type of a seal is it?

A. The bottom of that bag is sealed over and the entire materials that form the bottom of the bag are sealed together. The seal in the Becker patent is not made on the side of the bag, but on the bottom of the bag. In other words, the bottom surface of a bag and top surface are sealed together, folded over and sealed together.

The Court: Like the old paper bags, from the bottom?

A. Well, I could describe it better by actually showing you how it is folded over.

(Testimony of Arthur Jerome Kercher.)

The Court: Well, it is not important in any event. It is folded over.

Mr. Flehr: Q. I think I can make that clear, your Honor. What you mean, Mr. Kercher, is that the seal goes through all the thicknesses of the bottom and the top and the closed tube at the bottom of the bag?

A. That is what I mean.

Q. Will you please refer to the Munson patent 1,953,122? I wish [229] you would please describe to me the invention, or the machine which is shown in that patent.

A. The machine in the Munson patent has in addition to the mechanism for sealing the bottom of the tube a mechanism for taking a sheet of cellophane which is rolled up on a roll——

Q. That is 5 in Fig. 1 of the patent?

A. Yes. Roll 5 in Fig. 1 of the patent. This cellophane is passed over a roll marked 12 in Fig. 2, a tension device, 87; it is passed by a roll which applies a sealing contact to the surface of the cellophane. That roll is——

Q. By sealing contact, you mean something like glue or paste?

A. Something like glue or paste. This roll is indicated by the figure 26. This roll is also in contact with a container marked No. 17, which holds the glue or paste. The material with the glue or paste applied to one surface, or one edge, is next passed over a device which causes it to be folded around

(Testimony of Arthur Jerome Kercher.)

and over a mandrel or forming bar, illustrated in Fig. 9 by the figures 43 and 44.

Q. That is a continuous type of folding device?

A. A continuous type of folding device. This is passed along over and folded on the mandrel, which gradually changes its shape, so that in Fig. 10 the holding or pressure bar 57 would seal the two edges of that sheet of material together at a point marked "B".

Q. That is, that forms a longitudinal seal which is glued together?

A. Yes. That is then passed through the machine. The sections of this tube that have been previously formed are cut in Fig. 6 of——

Q. Mr. Kercher, just to simplify this: You have reference to the cutters 110 in Fig. 1?

A. Yes, I have reference to the cutter 110 in Fig. 1. It is then passed through a small conduit [230] and engages a roll marked 130 and 131 in Fig. 1, which press a groove near the end of the tube.

Q. Could you term that a creasing operation?

A. You could term that a creasing operation. It is then passed between rollers 150 and 151, or, rather, before that, it is passed through a device which folds over the crease on the bottom of that that has been previously made, and as illustrated in——

Q. You have reference to the device shown in detail in Fig. 15?

(Testimony of Arthur Jerome Kercher.)

A. It doesn't happen to be in Fig. 13.

Q. 15 is the one I referred to.

A. 15. Yes, I have reference to that device. In this device there is a plate 142, and a plate, 145. These are supported by blocks 144 and 143, the plate 145 having on its under surface, or a surface with respect to plate 147, serrated edges. These edges drag down the creased top of this bag and they are next passed between rollers which are designated in the Fig. 15 by 151 and 150.

Q. Just a moment. These plates you refer to, are they stationary?

A. They are stationary plates.

Q. They simply are a form of nozzle through which the end of the bag is forced? A. Yes.

Q. Proceed.

A. This is passed next through the rolls 151 and 150, on which this creased portion across the folded sides, or the end of this tube is pressed together. It then continues through the machine and a heating device is arranged to contact that part which is folded over, and this heating device is carried along with the motion of the part through the machine for a distance that would enable the parts to be heated and fastened together.

Q. Does it form a seal similar to the Becker patent, or is it different?

A. The seal is identical with the one in the Becker patent. [231]

(Testimony of Arthur Jerome Kercher.)

Q. In other words, it is a complete seal of those bottom edges of the bag to form a closed tab?

A. Yes.

Q. This machine shown in the Munson patent, would you say that that is a comparatively simple machine, or is it quite complicated?

A. The machine in the Munson patent is a machine that is very complicated.

Q. Do you think that machine would be easy for an ordinary operator to set up and operate?

A. It would be, yes.

Mr. Flehr: That is all.

Mr. Schapp: That is all.

Mr. Flehr: The plaintiff rests, here, your Honor.

The Court: The plaintiff has rested.

CHARLES F. SCHULTZ,

One of the Defendants, Recalled in his own behalf;
Previously sworn.

Mr. Schapp: Q. You have been sworn?

A. Yes.

Q. What is your full name?

A. My name is Charles F. Schultz.

Q. Your age? A. 33.

Q. Your residence?

A. Oakland, California.

(Testimony of Chas. F. Schultz.)

Q. Your occupation?

A. I operate a machine shop in Oakland, also a cereal manufacturing plant in Los Angeles.

Q. Are you one of the defendants in this case?

A. I am, yes.

Q. Who is the other defendant?

A. My brother, Ira E. Schultz.

Q. What has been your general experience with machinery, Mr. Schultz?

A. I have worked with machinery as far back as I can remember. In mechanics in high school I took an extensive course in auto mechanics. I did three and a half years of college training, also general machine design at the Central Trades School in Oakland, and I had developed cereal puffing machinery in connection with our plant that we once operated in Oakland; also an [232] automatic bag-filling machine, which is—some of which we have sold and are still in operation. The puffing machinery is still in operation. I have also developed some machinery for sealing—crimp sealing.

Q. In developing your machine did you do the work, yourself?

A. I did, yes, largely myself.

Q. Have you ever filed any patent applications on any machinery?

A. I have, yes, and received a patent on a bag-forming machine for Pliofilm.

Q. Are you familiar with the machine Defendants' Exhibit 1?

A. Exhibit 4?

(Testimony of Chas. F. Schultz.)

Q. Defendants' Exhibit A. A. Yes.

Q. Did you have anything to do with the development of that machine?

A. I worked for many months, in fact, years, developing that machine.

Q. Will you please state in related order just how you came to develop that machine, starting from the earliest beginnings?

A. In the early beginning we——

The Court: Fix the time.

A. In 1934 we began manufacturing cellophane bags for use in our cereal plant, and employed three girls to make them around forms quite similar as that Hunt method. We purchased a Simplex machine because we needed more bags.

Mr. Schapp: Pardon me a moment. Will you please give an exact description how you made your bags?

A. We made those bags around a wooden form. The sheet was wrapped, folded about a wooden form providing an overlapped area on one side and the end of the form, and the operator sealed this bag by the means of applying heat and pressure to the overlapping area on the end and side of the wooden form.

Q. Was that done by hand?

A. It was done by hand, yes. [233]

Q. Proceed.

A. We purchased a Simplex machine from Mr. Gaubert and we asked him, we complained of the

(Testimony of Chas. F. Schultz.)

machine being too slow for our purpose, and we purchased a set of gears and made the machine operate faster, and Mr. Gaubert installed these gears for us. We still couldn't manufacture enough bags, so we bought an additional machine. We still could not conveniently make enough bags for our requirements. I spent considerable time trying to figure a way that we could speed up the operation of Mr. Gaubert's machine, and I concluded that it was impractical, that it could not be speeded beyond the point to which it was operated. We then began developing a machine similar to the one you see marked Defendants' Exhibit A. We worked for over a year, around a year, and then used it for a short time in our own plant before we disclosed it to the public.

Q. When you say "we" whom do you mean?

A. I mean my brother, Ira, and I.

Q. When was that machine finished?

A. The machine was finished in our own plant, I believe, in 1936, or the early part of 1937.

Q. After you had finished the machine and operated it, did you find it successful?

A. We found it successful, and at least four times as fast as the other machine that we had been using.

Q. About how many bags could you manufacture on that machine per hour?

A. Referring to——

(Testimony of Chas. F. Schultz.)

Q. Your machine. A. Our machine?

Q. Defendants' Exhibit A.

A. We manufactured approximately 5000 bags, between four and five thousand bags per hour.

Q. Now, Mr. Schultz, you have already demonstrated the manner in which the machine works, and you have already given a description of the machine, and I hardly think it will be necessary to go through all that again, your Honor, unless your Honor wishes [234] to see it again. I just wish to call your attention to one particular point. This mandrel in your machine seems to be rather flexible. Is that a part of your machine, that the mandrel should be flexible or is that called for in any way?

A. It is not. It happens to be incidental. In fact, we have used a double thickness plate for making square type bags. It is absolutely fixed and will not flex. The mandrel shown, what we call a forming plate, shown on this machine is flexible. For that reason we desired a very thin member about which to wrap the bag, the thinner you can get, or still thinner, and still retain its shape and it would make a better finished bag. There is no purpose in flexing. In fact, the machine shown in the moving picture the other day had a spring on each of the—or should have had, was furnished by us with a spring on the two posts that hold the fold-retaining means and hold it down in contact with the upper surface of the folding plate, to keep it from making the up and down movement that we saw in the moving

(Testimony of Chas. F. Schultz.)

picture. Those springs either had been taken off or loosened to allow the plate to rise, as shown in the moving picture.

The Court: Well, there was no spring at all in the picture.

The Witness: They were there—apparently my brother pointed them out on the picture——

The Court: Well, it may be myself; I didn't think there was one there.

Mr. Flehr: Yes, your Honor, there were springs. This machine has no spring at all. They were supposed to have given us the details of this machine as they manufactured and sold it. It seems they took the liberty to take the spring off, or they didn't want to have it here. The machine we tested did have the spring on, and then we took the spring off to see what difference [235] it made.

The Court: I want to correct myself if I am in error. As I looked at it I didn't see any spring there to take that play away.

Mr. Flehr: The spring is here; your Honor saw it——

The Court: That is not what I am talking about. I am talking about a different one.

Mr. Flehr: Yes, I understand it. I was going to explain where the spring was.

The Court: I don't care where it was, or a thing about it. Was there a spring there?

The Witness: Yes.

(Testimony of Chas. F. Schultz.)

The Court: That is all I wanted to know. I want to correct my own error, if I was in error. I didn't think there was.

Mr. Schapp: Q. Is it desired for the operation of your machine to have that movement——

A. No, it is not desired. The springs were placed there to keep the mandrel from raising. If it raised to meet the other working parts that will tear the web. That is the purpose the springs were put there, to keep the mandrel from raising when the material was pulled.

Q. What would be the ideal condition in your machine with respect to the mandrel?

A. The ideal condition would be to have the mandrel spaced approximately .010 of an inch above the supporting member beneath the plate and be absolutely rigid.

Q. Have you been able to approach that desirable state?

A. Not in the plate that is shown on this machine. The other plate, which, if you desire it shown, is rigid.

Q. Have you the other plate here?

A. I have, yes.

Q. Will you please produce it?

The Court: I suggest to you, I am going to have these machines [236] operated again, both of them. If you can conclude your testimony without doing that then we will take time to operate both of them.

Mr. Schapp: I introduce this.

(Testimony of Chas. F. Schultz.)

Mr. Flehr: What are you introducing this for, Mr. Schapp, just as illustrative of the testimony, or as showing——

Mr. Schapp: This is illustrative, how the machine works.

Mr. Flehr: Because in your evidence you said nothing about this mechanism at the time we secured the evidence.

Mr. Schapp: And this is for the purpose of showing that is an absolutely rigid mandrel.

The Court: He has made an advance in the machine since you put in your evidence.

Mr. Flehr: I don't think that is correct. I think if the witness will answer the question I think he had that all the time.

The Witness: This plate is designed for making different type bags on the same machine.

Mr. Flehr: You had it on hand at the time we inspected the machine——

The Witness: I believe we did.

The Court: Well, proceed.

Mr. Schapp: Q. Will you please explain this?

A. This plate provides a double thickness whereby a gusset or tuck may be taken in the side of the bag, which tuck when the bag is opened gives the bag a square dimension rather than flat, and this plate is rigid, and it will take considerable pressure to bend this forming plate which is used interchangeably with the flexible plate that you see now in the machine.

(Testimony of Chas. F. Schultz.)

Mr. Schapp: I wish to introduce this plate in evidence and ask the same be marked.

The Court: This is off the record. [237]

(Discussion off the record.)

(The plate last referred to was marked "Defendants' Exhibit F.")

Mr. Schapp: Q. Now, Mr. Schultz, have you studied the patents which form part of the prior art? A. I have, yes.

Q. Have you gone through them very, very carefully? A. I have studied them carefully.

Q. Have you studied the Gaubert patent?

A. I have.

Q. In issue? A. Yes.

Q. Have you studied it very carefully?

A. I have, yes.

Q. Are you familiar with the terms used in the Gaubert patent? A. I am.

Q. Are you familiar with all the terms used in the prior references which have been brought to the Court's attention? A. I am, yes.

Q. Now, I will ask you in connection with the Beyer patent——

The Witness: Could we have that set up over here, Mr. Schapp?

Mr. Schapp: Now, Mr. Schultz, will you please explain to his Honor the operation of the machine shown in the Beyer patent of 1881?

A. Fig. A represents what is spoken of in the

(Testimony of Chas. F. Schultz.)

patent as a table top. Fig. B is called a forming plate. Figs. E and F are slidably mounted folding plates. On the end is another folding plate marked 1. Fig. C represents a connecting rod connecting the movable plate with a foot treadle d. g and h are spoken of as levers acted upon by the foot treadle when it is depressed. k is a raised ridge and j is a trough provided to hold glue or adhesive. I believe those are the main working parts.

Q. Will you please explain how the machine operates?

A. A sheet of paper is placed on the table top with edges resting [238] on the folding plates e and f, and one end resting on 1. The foot treadle is depressed, bringing down the forming plate b, with the top and center portions of the sheet. Next f moves in over the forming plate. Next the glue trough comes down supported on the raised ridge. Then folding plate e moves over the mandrel folding the paper about the edges of the mandrel, or forming plate. Then the end margin is folded over by a slidable member, a roller, which folds the material over the end and presses it down. The patentee stated that the paper was cut to size and cut in the usual manner for making paper bags. The paper bags today are cut away as Mr. Schapp cut away that bag the other day, on the bottom, to allow the glue to hold the material in place, and also so as not to require that fold line retaining means that was mentioned yesterday. This bag was

(Testimony of Chas. F. Schultz.)

picked up yesterday and is in use, it is a modern paper bag in use to-day. I might mention that the cut-away portion on one bag extends on top of the other bag, making it more easily opened.

Q. Mr. Schultz, have you made any attempt to reproduce the Beyer machine in a model?

A. I have reproduced it in a cardboard working model.

Q. Did you make this model that I am showing you?

A. This is the model that I reproduced of the Beyer patent from cardboard.

Mr. Schapp: To identify the model, I ask that it be introduced and marked Defendants' Exhibit G.

Mr. Flehr: Just as illustrative of this witness' testimony?

Mr. Schapp: I beg your pardon?

Mr. Flehr: Just as illustrative of this witness' testimony?

Mr. Schapp: Yes.

(The model was marked "Defendants' Exhibit G.")

Mr. Schapp: Q. Now, Mr. Schultz, will you please explain this [239] model to his Honor?

The Court: You will have to speak loud enough for the Reporter to hear you.

The Witness: This upper surface represents a table top. We have produced it in cardboard, members that can be moved over the forming plate. We also have here a cardboard section representing the

(Testimony of Chas. F. Schultz.)

folding plate mentioned by Mr. Beyer; this represents pre-formed sheets we have chosen to cut with square sections from the edges of the sheet——

The Court: Is that the way they are cut when on the machine? A. It could be cut.

The Court: Not what it could be. What is the fact?

A. We didn't try to cut on rounding cuts such as——

The Court: What is the purpose of cutting this bag?

A. It is to allow this to fold without a fold-like retaining means.

The Court: We are not here concerned with a full crease.

A. If you so desire I will cut a piece.

The Court: No. I just wanted you to get my thought on it. You proceed in your own way.

The Witness: The patentee merely stated the fact that the sheets are cut in the usual manner for making paper bags. What the usual manner was in that date, 40 years ago, we are unable to know exactly. What the usual manner is to-day——

The Court: We will leave that to the lawyers. They will tell us.

The Witness: The usual manner to-day, what there is described by the cut-out portion on this paper bag, we interpreted the usual manner to mean that notches are formed on the two corners on one end; the material that is cut away is merely wasted

(Testimony of Chas. F. Schultz.)

[240] when it is turned up, anyhow. If you cut the bag straight across, turn the material up, the bag is no stronger than it would be if this top section were cut away. There is only one thickness to tear along this bottom area regardless of whether this material is cut away, whether the bottom is turned up or whether the material is cut and folded in the bottom seam, it is not used, in fact it makes it harder to glue or harder to heat seal a bottom, because the heat must penetrate through this sheet, through this sheet to the third sheet. If it is not cut away it merely makes it a little easier to cut a sheet squarely or rectangularly than to cut away a portion of it in the other operation.

This sheet is placed on the table top, the table top serving a definite function, to hold the sheet of paper in place. The forming plate is brought down upon the sheet by the foot treadle and connecting rod. Next one side member is brought in over the plate which folds the material at substantially 180 degrees. Next the glue would be brought down, the glue trough would be brought down to place adhesive on the edges of the sheet. Then this other slidable means comes in over the forming plate and folds and presses down the sheet. Then the glue trough on the end acts on the sheet to deposit a small amount of adhesive and the end member carrying a roller slides in over the end and rolls the end of the paper over the end of the forming plate.

(Testimony of Chas. F. Schultz.)

Mr. Flehr: When the operator is there.

The Witness: These are all retracted, the mandrel is raised by a spring and a weight and the finished bag is taken off by the operator.

The Court: It is now time to take a recess.

[241]

(After recess:)

Mr. Schapp: Q. Does the Beyer patent say anything about the shape of the sheet that is used to form the bag?

A. It said the sheet is cut in the usual manner for cutting paper bags, the usual or customary manner. I think it is usual.

Q. Calling your attention to line 55 on page 2 of the Beyer patent, I will ask you to read it.

The Court: It reads as follows—you read it.

Mr. Schapp: Which reads as follows:

“The paper is previously cut out in the ordinary manner for bags.”

Q. Mr. Schultz is there anything unusual in forming a blank with a flap?

A. I see nothing unusual. It seems to be still customary to cut them out sometimes.

Q. Isn't that done with most bags you see on the market at the present time?

A. Yes, it is done.

Q. I call your attention to the Hunt patent and ask you to briefly explain this patent to his Honor.

A. In the Hunt patent Fig. A is a sheet of paper showing the face. Fig. 2 shows the edge. Fig. 3 shows

(Testimony of Chas. F. Schultz.)

a block around which the paper is wrapped. Fig. 4 shows the sheet of material wrapped around the block. Fig. 5 shows the sheet wrapped around the block and the bottom folded over the block. Fig. 6 shows the block with the sheet wrapped around it and a heated element spoken of as a presser pressed with the handles D' over the overlapping area, one end, and the edge of the block. Fig. 7 shows a different view, side view of Fig. 6.

Q. Have you made a model to represent these parts shown in the Hunt patent to which you have just referred? A. I have, yes.

Q. Is this the model?

A. That is the one. This is the model [242] I made to demonstrate the Hunt patent.

Mr. Schapp: May I introduce this model at the present time and ask it be marked Defendants' Exhibit H?

(The model was marked "Defendants' Exhibit H.")

Mr. Schapp: Q. Will you please explain to his Honor how the invention works by way of that model?

A. I hold in my hand a wooden block representing Fig. 3 in the Hunt patent. A sheet of paper, I believe wax paper is mentioned in the Hunt patent, that will fuse with heat at pressure, is wrapped around the block providing an overlap area. Then the bottom——

(Testimony of Chas. F. Schultz.)

Mr. Flehr (Interrupting): Just a minute, Mr. Schultz. Will you tell everything that you are doing there, including the Scotch tape you have?

A. I am wrapping the sheet of paper——

Mr. Flehr: You are taking off the Scotch tape?

A. The Scotch tape was put on here to keep the sheet from getting lost. I am wrapping around this form a sheet of wax paper. I am holding this with one hand and forming a bottom. Next a presser which is heated and held by handles D' in the figure is pressed on the overlap area, and it fuses the wax on the wax paper, the wax coating, and the presser is removed and the finished bag is taken from the form.

Mr. Schapp: Q. Now, Mr. Schultz, I read to you Claim 2 of the Gaubert patent and will ask you whether you find the different parts of the Gaubert patent in the Beyer patent.

Mr. Flehr: May I have that question read?

The Court: Read the question.

(Question read.)

Mr. Schapp: "In a machine of the character described for the manufacture of paper bags from sheet material like 'Cellophane'"—Is that made from sheet material in the Beyer patent? [243]

A. It is made to handle sheet material.

Q. "A frame forming an operating table."

A. Fig. A is called in the patent a table top.

Q. "A plate-like mandrel movably secured to said table."

(Testimony of Chas. F. Schultz.)

A. I find that as Fig. B of the Beyer patent. It is movably secured; as I interpret that it moves at the point of attachment or securing.

Q. "Whereby a sheet of said material can be placed between one side of the mandrel and the table." Is this mandrel secured in such a manner that a sheet of paper may be placed between the mandrel and the table? A. Yes, it is.

Q. "Means for folding the side margins of the sheet over the side edges of the mandrel."

A. Yes. Those are provided as Figs. E and F, called forming plates.

Q. "Means for folding a projecting end margin of the sheet over one end edge of the mandrel."

A. Yes. That is Fig. L in the Beyer patent.

Q. "And means for applying a heated surface under pressure to overlapping portions of the side margins and to the end margin along an area where the end margin overlaps the side margins."

A. Whether pressure is mentioned, I don't know. Heated surface is not mentioned in the Beyer patent.

Q. Very well. I will ask you to apply the same claim to your own device. I will read the claim again to you and I will ask you to find, if you can, any part in your own machine.

"In a machine of the character described for the manufacture of paper bags from sheet material like 'Cellophane'."

(Testimony of Chas. F. Schultz.)

A. We have no provision for handling a sheet of material on our machine.

Q. "A frame forming an operating table."

A. For the purpose of [244] holding the material between the mandrel and the table top, or for any other purpose, we have nothing that I construe to be a table top. We do have a slight support under a portion of the forming plate.

Q. "A plate-like mandrel movably secured to said table whereby a sheet of said material can be placed between one side of the mandrel and the table."

A. There is no way that you can place a sheet—the machine doesn't provide any way of placing a sheet between the forming plate, as we call it, or the mandrel and the table top, as mentioned, unless you were to take and flex the material by hand and place the sheet under. The machine in its operation doesn't provide any means for raising the mandrel or for placing a sheet of paper any place in the machine.

Q. Is your mandrel movably secured to its support?

A. The mandrel is locked at all times at the place of support. It is necessary to the operation of the machine that this part be secured in a tight manner so there will be no movement at that point.

Q. Is it required for the operation of your machine that the mandrel be flexible in any way?

(Testimony of Chas. F. Schultz.)

A. It is not. The mandrel; if it were possible to space it from the top of the machine, or from the support under it, it would never have to move.

Q. Now, do you have "means for folding the side margins of the sheet over the side edges of the mandrel"?

A. I want to call attention to the sheet, the web of material, is held at such an angle by the fixed roller that the web folds in the air, folds before it reaches, or before it touches the end of our forming plate to a degree, an angle of approximately between 45 and 90 degrees, and that the next folding is accomplished toward the end corner of the plate. We provide no means for folding it [245] over, folding a sheet over the side margin of the mandrel or plate.

Q. Will you please refer to the side margin of the mandrel, point that out?

A. I consider this a side margin, from this point. The side margin of the mandrel as described in the other machine would be only the sides where the bag, itself, is formed and made. In a forming plate, our forming plate the side of our forming plate extends from this corner to this corner.

The Court: The length of the plate?

A. The length of the plate, the side.

Mr. Schapp: Q. Does any folding take place here in the forward end of the mandrel?

(Testimony of Chas. F. Schultz.)

A. No folding whatsoever. That is all accomplished previous to that point.

Q. "Means for folding a projecting end margin of the sheet over one end edge of the mandrel." Do you find any means for doing that?

A. Well, I find no means for holding the sheet. It is absolutely essential that the mandrel hold the sheet securely, if you are using a sheet, that the mandrel takes the sheet securely between the mandrel and the table top while that end edge is being folded. We have no provision for a sheet and no provision to hold a sheet between the mandrel and the table top. Therefore, we could not hold it in place while an end projecting margin, a projecting end margin were folded over the end of the forming plate.

Q. I call your attention to the end sticking out here in front. I will ask you, does that end in your machine fold over the forming plate or mandrel?

A. In our machine the end margin folds over the fold line retaining means, and we have provided approximately a quarter of an inch ahead, or in front of the forming plate—this is occasioned by the use of pinchers, advancing [246] means, means to project that margin ahead of the plate by which to take hold of the material for advancing. We do not fold over the end margin of the plate. We do fold over this fold line retaining means, which comes ahead of the plate. Therefore, the bag, when it is formed, projects ahead of the plate a suffi-

(Testimony of Chas. F. Schultz.)

cient amount to be taken hold of without touching the plate to be drawn off.

The Court: That will be operated again so we can get the arrangement of it.

Mr. Schapp: Now, I will read the next:

“And means for applying a heated surface under pressure to overlapping portions of the side margins and to the end margin along an area where the end margin overlaps the side margins.” Do you provide any——

A. The area where the end margin overlaps the side margins would be at this point. We do apply heat and pressure across the end of the plate and at different distances along the longitudinal seam which never comes closer than an inch and a half from the end or cross seam, within that direction of the seam of the overlapped area. That is not contacted in one operation. It is contacted only because the heater working back here, we will say, is exactly the same length as the bag to be pulled out. Therefore, a bag six inches long and the heater, say, six inches and a half—six and one-eighth inches, here, a continuous movement at this point would make one continuous line. This point could be anywhere on the machine. It could be clear back here. If this same six inches were sealed successively there would be a continuous longitudinal seam perfectly sealed in the web of material. Then it is only necessary to seal a cross section to form a completed bag.

(Testimony of Chas. F. Schultz.)

Q. Would you call your heater used in this machine a heating [247] surface?

A. In fact, we have two heated surfaces, either one of which may be removed at any time separately from the other, and they are spaced apart. In this particular machine set up now they are spaced at least six to eight inches from each other. The heated surfaces that contact the material there form a right angle but hardly a T.

Q. Does your heater, as used in your machine, perform the heating operation in a single operation?

A. It does not. The first operation on this bag shows the bottom formed perfectly, and shows a portion, depending on where this heated surface is placed, anywhere from an inch and a half to sixteen inches from the other seam, sealed perfectly. In between those two points there is no seal in the first operation.

Q. Now, Mr. Schultz, I refer you to the heater shown in the patent. I will ask you whether you could use that heater shown in the patent in connection with your machine.

A. We could not use that heater. If we attempted to use the heater as shown in the patent it would rest on this fold line retaining means and could not contact the material.

Q. On the other hand, if I call your attention again to the two machines, could you use your heater on the Gaubert machine as shown in the patent to make a complete bag?

(Testimony of Chas. F. Schultz.)

A. It would be absolutely impossible to use our heater, because the bag would show an area at least an inch and a half long on the longitudinal seam that was not sealed.

Q. In your heater is it possible, according to your construction, to bring the longitudinal heating element close up to the transverse heating element?

A. The machine operates much better when this longitudinal heating surface is placed as far as possible from the cross seam. The purpose of this is to allow [248] cooling of the machine and of the sealed surface, so that the two halves, or two surfaces of the bag would not stick together after the bag is completed on a machine as fast as this. We have actually had the bag stick together so when you filled the bag you had to force the two sheets apart. We overcame that by, in a small bag when we operate the machine at top speed, placing the longitudinal heated surface as far as possible from the cross heated surface.

Mr. Schapp: That is all, Mr. Schultz.

Cross Examination

Mr. Flehr: Q. Mr. Schultz, I believe you said that you made bags by hand in your establishment according to the Hunt method.

A. Very similar.

Q. What kind of a heater did you use?

A. We used an electric sealing iron.

Q. That is something like a common flatiron?

(Testimony of Chas. F. Schultz.)

A. No, it was not like a common flatiron. It provides a long heating surface. We used only one long heating surface with a wooden handle attached to it that we used first on one seam, then on another seam.

Q. You first put it on the end and then on the other side? A. Yes.

Q. You referred to springs upon Defendants' Exhibit B (Defendants' Exhibit A) for holding down the mandrel. Do you have those springs upon all of your machines?

A. We do. All of our machines are provided with those springs. The machine shown here was brought to this Court because it was the machine from which the drawings, our drawings were made, and because we had this machine available.

Q. You have complete drawings of your machine, have you? A. Yes, we have. [249]

Q. I believe your counsel stated you had no drawings. Would you come down here, please, Mr. Schultz, and tell me just where those springs are to be placed? Do you have any of them, by the way?

A. Not presently with me. We do in our establishment. The spring is put on the projecting portion of the two posts that hold and move the fold line retaining means to hold it down, which in turn holds the front end of the forming plate down.

Q. Resiliently, so it can raise a certain amount?

A. The function of the machine does not require—

(Testimony of Chas. F. Schultz.)

Q. Please answer the question.

A. I believe it is still possible to detect a very, very slight movement up and down on the plate. I have not checked that point carefully.

Q. How are the springs held in place, Mr. Schultz?

A. The springs are wedged downward on these posts.

Q. Mr. Schultz, I will have to ask you to produce such springs. Will you, please?

A. I can't today; they are not available at the moment.

Mr. Flehr: Well, your Honor, these people are contending that they are using something which avoids the movement here, or, at least, cuts down the amount of movement. I certainly think they should produce those springs to show what they say they are doing.

The Court: Why can't you produce them?

The Witness: We don't have them with us. I can wrap some adhesive tape around the post to represent a spring to hold that member down, which would serve the same purpose as a spring, or Scotch tape, anything that is available. I am sorry we do not have the springs. I did not know they would be mentioned or had any bearing on the case.

The Court: Let's proceed. I am not presenting the case. [250]

(Testimony of Chas. F. Schultz.)

Mr. Flehr: Q. The springs, you say, are not fastened down anyway, they are simply put on there frictionally?

A. They are put on there frictionally?

A. They are put on there frictionally, yes.

Q. Isn't it a fact the reason why you have the springs on some of these machines is that in certain instances the moisture-proof cellophane sticks badly to your heater so when you pull up your heater your mandrel will come all the way up with the heater?

A. No, that is not true. It has never done that.

Q. What I mean is, without those springs under certain circumstances and with a certain type of cellophane you get sticking action which jerks the whole mandrel up and may possibly make the machine inoperative?

A. No. The machine as shown here without the springs will operate perfectly. The springs are only used when the machine is speeded to full speed, the jerking movement of the advancing means on the web go over an arc from a point of attachment, or a point when they contact the material, making it describe an arc in the outward movement. There is sometimes vibration on the plate. I have not noticed a sticking of the heated surface and to the material, itself. If there is any sticking it will stick to the plate, itself. The material will stick to the plate but not to the heated surface to any appreciable extent.

(Testimony of Chas. F. Schultz.)

Q. Then do I understand you that if you would take those springs off this machine the machine for all purposes would operate just the same as you demonstrated here, or as shown in the motion picture?

A. The machine will operate either with or without the springs, both ways.

Q. And you get motion of the mandrel in both instances?

A. You get more movement without the springs than with the springs, [251] decidedly so. I didn't know the point was so important to your case. I haven't watched the slight movement—it is very slight.

Q. Movement of the mandrel when the springs were firmly in place, well, with or without the springs, you get that movement of the mandrel so that when the heater raises up there is sufficient clearance below the mandrel and you can pull the paper through?

A. There is always sufficient clearance between the mandrel and the support to allow the bottom of the paper, which is possibly .010 of an inch——

Q. To allow the paper to be drawn through?

A. It doesn't take any more space when the paper is drawn through than it does when it is resting.

Q. When it is resting on what?

(Testimony of Chas. F. Schultz.)

A. When the machine is in a resting position—when the machine is not in operation the plate, or the distance between the plate and the support is exactly the same; it doesn't need to be any greater when the machine is in operation than when the machine is resting with the web about the plate.

Q. Nevertheless, as this heater comes up and as we saw in the picture there is a definite raising movement of the mandrel which has the effect of framing the paper so it can be drawn through between the mandrel and the—

A. (Interrupting) I don't know exactly what you mean. You seem to infer—

Q. I am asking you a straightforward question.

A. I am trying to answer the question. You seem to infer there must be more space in a forward movement of the material between the mandrel and the back than when the machine, or when the plate and the machine is not in operation. The forward movement of the cellophane does not require any more space between the two members than is required when the machine is first operated, or [252] when the material is first brought through.

Q. What is the thickness of moisture-proof cellophane?

A. Let's say .010 of an inch. I don't know exactly what it is.

Q. Let's say .003 of an inch.

A. All right, that is satisfactory.

(Testimony of Chas. F. Schultz.)

Q. You mean to tell me if the spacing between the lower side of the mandrel and the top of that table is .003 of an inch then you could freely draw the cellophane between the mandrel and the table at the same time with the cellophane .003 of an inch?

A. The cellophane .003 of an inch and the spacing .003 of an inch you could draw cellophane through there.

Q. You could freely draw it through?

A. It is not necessary to draw it freely. It will draw through. It will touch both surfaces, it will just draw through.

Q. If you have cellophane .003 of an inch it would be practical to have a perfectly rigid mandrel which could not move a fraction of an inch and with a space .003 of an inch——

A. Well, three and a half thousandths might be preferable.

Q. Well, let's assume you do have .0035. What happens when the heater comes down upon the mandrel?

A. If the spacing was .0035 and paper was .003 and the paper didn't yield, the mandrel would have to spring one-half thousandths of an inch, which no person could detect with the naked eye.

Q. Is that why you say there is no movement, because you couldn't detect it?

A. Basically so. If you are confining your question to a half of a thousandth of an inch why it

(Testimony of Chas. F. Schultz.)

is very difficult to say yes or no when I haven't been accustomed to looking at surfaces of a half a thousandth of an inch.

Q. Is that why you testify that this mandrel, this resilient mandrel of the defendants' Exhibit B (Defendants' Exhibit A) [253] does not move, simply because it moves such a small amount?

A. Because I have not seen or paid any particular attention to the movement when the springs come in place or otherwise. I say that it doesn't move, it is not the intention of the machine to have the mandrel move.

Q. But it does move, and, as you have testified, even though your mandrel is rigid it would be better to have it spaced somewhat greater from the table and when the heater comes down it would spring down to heat the cellophane; is that right?

A. Basically true.

Q. You have produced a paper bag here this morning. Is this the bag you produced?

A. It appears to be the same bag that I produced.

Q. How do you describe that?

A. I describe this as having a cut-away portion on the upper surface, generally describing a circle or crescent approximately an inch and a quarter of the material being cut away.

Q. You just went out and got that on the open market? A. Correct.

Mr. Flehr: I offer in evidence the bag which the witness produced.

(Testimony of Chas. F. Schultz.)

The Court: It will be admitted and marked.

(The bag was marked "Plaintiff's Exhibit 21.")

Mr. Flehr: Q. On this model, Defendants' Exhibit G, the wax paper blank that you have which has cut out corners is not exactly corresponding to a paper bag, is it?

A. Not exactly. I just cut that very crudely with a pair of scissors. It was not cut with a machine.

The Court: It was cut for the purpose of this operation?

A. Of this operation, to show how the machine operated, yes.

Mr. Flehr: Q. In other words, you have square cut corners, [254] here? A. Yes.

Q. Referring to this wax paper from the model, Defendants' Exhibit G, as I understand it glue is attached to the tab; is that correct?

A. I think so.

Q. And then it is glued across? A. Yes.

Q. That will leave small openings in the corners, will it not?

A. It is liable to leave a small margin.

Q. What I am saying, if you glue across the edge of that tab to one side of the bag then the bag simply has open corners?

A. I can't say that the corners would be any different either in this case or if you have one of the other bags. I believe you will find the corners, so far as the air getting into the bag, would be

(Testimony of Chas. F. Schultz.)

the same whether as what you have cut away, or whether merely sealed overlapped sides.

Q. I am not talking about bags sealed sufficiently tight to be watertight. I am calling your attention to the corners and asking you if those corners are not open on that type of bag.

A. I believe they are open.

Q. Would you put that paper back into the model a moment, please?

A. All right.

Q. Now, I am putting the side folded member over the top of the bag and I am putting the end folded member over the top of the end. Is that the position?

A. As I interpret the patent, no. It says the members do not touch. It doesn't say how far they cover the back. It is not necessary for them to more than fold, due to the folding operation. It says they do not touch, it doesn't state how close those members approximate each other.

Q. As I handed you the model, I had moved the side folding members into the point where their edges contacted, and I had also moved the end folded member into point of contact, the end edge [255] with the side folded members. Just where do you find in the specification a statement to the effect they are not moved in——

A. As I remember——

Q. I am referring to the specification of the Beyer patent.

(Testimony of Chas. F. Schultz.)

A. As I remember, it says in the description of the Beyer patent——

Q. Point it out.

A. The ends do not touch.

Mr. Schapp: I have got it here, Mr. Schultz.

Mr. Flehr: That is a marked copy; I am sorry.

The Witness: Thank you. Which page?

Mr. Schapp: Well, I refer you to page 1, line 50, on the first column.

The Witness: I am reading from the Beyer patent, line 50, page 1:

“They approach each other but do not touch.”

Mr. Flehr: Q. What does that mean to you?

A. It means that we have no way of determining how far on that plate that those members move.

Q. You testified about the desirability of bringing some pressure to bear upon the overlapping edges of the paper, I believe.

A. I mentioned pressure, yes.

Q. About the only way you can get pressure is to bring the edges of those side folded members over the top of the overlap?

A. It is not required to exert any pressure whatsoever. The overlap areas would probably be sealed by the roller in this member and by a pressure down by this member, which serves no other purpose than folding. There is no pressure exerted on the light slidable folding plate.

Q. All right. To save time, suppose you fix on the model, Defendants' Exhibit G, the way you

(Testimony of Chas. F. Schultz.)

think it should be at the end of the folding operation?

A. I believe this may be folded over [256] at any point that would accomplish a perfect folding over upon the plate which would probably be, may be half way on that plate, and this member comes somewhat further. It doesn't say. It says they didn't touch. It is just an interpretation. You asked me to place it where I thought it should go and I placed it at a point similar to that.

Q. Any particular reason for your leaving such a gap between the adjacent edges of the side folding members?

A. The reason being that I have no way of knowing where the adhesive was applied.

Q. There are quite a few things lacking in that Beyer patent, don't you think so, Mr. Schultz?

A. There is one decided thing, as we pointed out, and that is a heating element.

Q. How do you propose to put this heater from your model, Defendants' Exhibit H, how do you propose to use that with that Beyer patent?

A. If I were using it in conjunction with the Beyer patent and for a heat seal instead of a glue seal, I would grasp this by the handle marked D' on the Hunt patent and press it on the overlap area. Now, I could press that either for these members—in other words, I could, if you want to say that these members—here, where this is applied, I could raise my foot slightly and place this heated

(Testimony of Chas. F. Schultz.)

surface on the overlapping area by using the reverse side, which is shown and described as a T shape or cross. I could use that on the overlapping side, even though these members may approximate each other very closely, I could raise my foot just slightly and I could place this heated surface on the overlapping area to form a heat seal in place of the glue seal.

Q. In other words, when you use the Hunt heater corresponding to your Defendants' Exhibit H instead of using the near sur- [257] faces which are at right angles to each other you would ingeniously use the back surface? A. Yes, I would.

Q. Now, coming to this Defendants' Exhibit H, would you take a plain piece of paper—do you wish to take a recess, your Honor?

The Court: I want to conclude the case.

Mr. Flehr: This witness has put in a lot of testimony and I am going to have to straighten it out and then I had two witnesses on rebuttal. I am very sorry we have not moved faster. I did not realize this witness would cover such ground, your Honor.

The Court: How long will it take you?

Mr. Flehr: Well, I would say it will take half an hour for the cross-examination and about that time for the other two witnesses.

(A recess was taken until two o'clock p.m.) [258]

(Testimony of Chas. F. Schultz.)

Afternoon Session—2:00 o’Clock

CHARLES F. SCHULTZ,

Cross Examination (Resumed)

Mr. Flehr: Q. Mr. Schultz, during the noon recess did you prepare another blank for use with Defendants’ Exhibit H? A. I did, sir.

Q. Would you just as quickly as you can fold that blank about the block in the way you understand the Hunt patent described? A. I will.

Q. Just describe for the record what you are doing.

A. I am wrapping a piece of wax paper about a wooden block as shown in Fig. 3 of the Hunt patent.

Q. You are holding that with your left hand?

A. I am holding it with one hand and vertically sealing the paper upon the block, the overlap area. Next I bring this from right to left over the end of the block.

Q. You are holding those with your first finger?

A. I am holding those two folds with the first finger of this hand. Next the back is folded over and lastly the front portion is folded over to make an overlap area on this part of the block. Now, it remains to put a presser over those areas and seal them.

Mr. Flehr: Do you wish to substitute this for the fold that was referred to, Mr. Schapp, before, as having been correctly folded, as I understand it?

Mr. Schapp: No; that’s all right.

(Testimony of Chas. F. Schultz.)

Mr. Flehr: Q. Now, Mr. Schultz, will you please step down here to this Defendants' Exhibit B (Defendants' Exhibit A). As I understand it, this heater is pulled down with considerable force during the sealing operation?

A. This heater is pulled [259] down during the sealing operation by hand. You can hardly notice it pulled down, but it is pulled down. I don't know what you mean by "considerable force".

Q. As I understand it, you told me the force might be sufficient to compress all the thicknesses between the heated body and the back. Would that cause a movement between the studs and the back?

A. Yes.

Q. How many pounds pressure would you say that would be? A. About 50 pounds.

Q. You can't see it in the machine as you have it set up. Can we lift up the mandrel?

A. By taking the machine apart.

Q. Can't you cut the paper? This 50 pounds you spoke about, as I understand it, is taken up and resisted by this structure immediately underneath the mandrel? A. Yes.

Q. It happens to be a T-shape also.

A. It is not connected but it generally describes a T.

Q. That T, then, of course, is fastened to these bars, and the bars are fastened to the frame of the machine? A. Yes.

(Testimony of Chas. F. Schultz.)

Q. That is a very rigid support?

A. That is rigid, yes.

Q. You spoke about this fold line retaining bar being advanced about one-half inch beyond——

A. One-quarter.

Q. One-quarter of an inch beyond the end of the mandrel? A. Yes.

Q. During the folding operation how long is the extension of the paper that you are folding there?

A. During the time of folding? During the time folding is being accomplished, you mean how long does that stay in that position?

Q. I mean how much of the cellophane do you fold over, what length?

A. You mean from here, these two points?

Q. That's right. Approximately three-quarters of an inch, one-half inch is folded over the end of the mandrel, is it not? A. Yes. [260]

Q. The other quarter—— A. Extends——

Q. (Interrupting) According to your interpretation, is simply folded over the fold line retaining means? A. Yes.

Q. When the fold line retaining means is moved out of the fold, as it does, before the heater comes down, then the heater presses that folded part approximately on the end of the mandrel?

A. Yes.

Q. In other words, the end of the mandrel makes a separation between the part that you are sealing and the other side of the bag? A. Yes.

(Testimony of Chas. F. Schultz.)

Q. Now, while we are here, do you have one of the long bars that you used in this heater when you made a large-sized bag?

A. I have at Oakland, not here.

Q. You haven't one here?

A. No. It is not necessary for this size; see, you couldn't use it.

Q. You sell this machine for large-sized bags?

A. Yes.

Mr. Flehr: Your Honor, I don't want to postpone this case to produce that part. It is a part of this machine.

The Court: Well, you can get a stipulation on the bar, maybe. What is it for?

Mr. Flehr: Will you produce one, yourself, and put it in evidence, Mr. Schapp, upon stipulation? The long size bar that goes in this machine.

Mr. Schapp: Certainly.

Mr. Flehr: It is a standard piece of equipment which comes with the machine, doesn't it?

The Witness: Yes.

Q. Suppose you sell this machine for the large-sized bag that the machine is capable of making, then you will sell a long bar to go into the heater?

A. Yes. [261]

Q. That is what I mean.

A. If I didn't—if we sell it for a small bag, if the customer uses only a small bag we furnish the heater for the same length bag that his requirements suit. We would not furnish various bars.

(Testimony of Chas. F. Schultz.)

Q. I am handing you a drawing and ask you if that is not an accurate showing looking at the lower side of your heater when you have it, when you have the long bar in the heater.

A. I believe it is.

Mr. Flehr: I offer in evidence this drawing the witness has just identified.

(The drawing was marked "Plaintiff's Exhibit 22.")

Mr. Flehr: Q. Now, also, while we are here, I want to make this point clear: On one operation of this heater when the heater is pressed down you make both a longitudinal seam and a lateral seam at the bottom of the bag in one operation, do you not?

A. You could if the seam is made in one operation.

Q. That is not what I am asking you. I am saying, in one operation you make both a longitudinal seal and you make a lateral bottom seal?

A. Yes; disconnected.

Q. In one pressing operation?

A. Yes, disconnected.

Q. When you were speaking a minute ago, explaining the effect of performing a sealing operation back here when you manufactured bags which are approximately one-half the length of this heater, what you really were calling attention to was the way you were cycling this machine upon

(Testimony of Chas. F. Schultz.)

two sheet portions; isn't that correct?

A. That is true.

Q. Mr. Schultz, this bar, if I take that out of the machine would the machine work?

A. No; not satisfactorily. It will after a fashion.

Q. After what fashion?

A. It will make bags. [262]

Q. What kind of bags?

A. That might be arranged.

Q. Did you ever try to work the machine that way? A. Yes; accidentally.

Q. How did it work?

A. It has made bags, they are not as satisfactory; they are not folded as neatly.

Q. Will you run your machine and try to make some bags that way?

The Court: Well, I think his admission is sufficient for all purposes.

Mr. Flehr: All right, your Honor.

Q. Now, do you find anything in the prior art which shows a fold line retaining means in conjunction with a mandrel in a machine for making bags? A. At the moment I don't recall any.

Q. You don't know of a thing, do you?

A. I don't recall anything in the prior art.

Q. Mr. Schultz, are you familiar with the so-called file wrapper of the patent in suit?

A. I have read it.

Q. You know what I mean?

A. Yes.

(Testimony of Chas. F. Schultz.)

Q. Do you know whether or not the Beyer and Hunt patents were cited by the Patent Office and considered by the Patent Office at the time the application was issued into a patent?

Mr. Schapp: I object to that. If they want to introduce the file wrapper they may do so.

Mr. Flehr: I shall.

Mr. Schapp: It is not the best evidence.

Mr. Flehr: I simply wanted to know whether or not this witness had taken the trouble——

The Court: He may answer if he knows.

Mr. Flehr: Do you know?

A. I believe they were alluded to; they were not mentioned at any great length.

Q. Are you positive of that?

A. Yes. [263]

Mr. Flehr: Your Honor, I will offer at this time a certified photostatic copy of the file wrapper of the patent in suit.

The Court: Admitted and marked.

(The file wrapper was marked "Plaintiff's Exhibit 23.")

Mr. Flehr: Incidentally, your Honor, I may state at this time that both the Beyer and Hunt patents were cited and were considered by the Patent Office before the patent was granted.

Q. Can you identify this device I am handing you?
A. Yes.

Q. Is that one of the springs you were talking about this morning?
A. It appears to be.

(Testimony of Chas. F. Schultz.)

Q. Will you show us how that goes on your machine?

A. Two of these are required, one on each of the posts that move the sliding bar, moves by friction, hold a spring tension down on the fold line retaining means.

Q. You have one upon each of the two fingers?

A. Yes.

Q. As you pointed out, they are held simply by a light frictional engagement upon the upper end of the pin?

A. I wouldn't say "light frictional"—depending upon adjustment.

Q. What adjustment?

A. Sometimes it is all you can do to pull them off. They are not really light——

Q. Are they very heavy?

A. Let's say medium.

Mr. Flehr: I offer in evidence the spring the witness has identified.

(The spring was marked "Plaintiff's Exhibit 24.")

Mr. Flehr: Now, Mr. Schultz, if you can come down here again, this little finger, as you had set up the machine during the noon recess, that finger is inserted between the fold, isn't it?

A. Yes.

Q. That is the proper place for it?

A. Yes.

(Testimony of Chas. F. Schultz.)

Mr. Flehr: That finger is identified in Plaintiff's Exhibit [264] 11 by the letter "C-3," is it not?

A. Yes.

Mr. Flehr: That is all.

Mr. Schapp: That is all, Mr. Schultz.

The Court: Call your next witness?

Mr. Schapp: Your Honor please, I understand your Honor would like to have the machine in operation at the end.

The Court: I want to hear all the witnesses first.

Mr. Flehr: What demonstration are you referring to, Mr. Schapp?

Mr. Schapp: Demonstration of both machines.

Mr. Flehr: Your Honor, I did not understand I am going to put on another demonstration, but it was my understanding that you wanted to see this machine operated with a special mandrel.

The Court: Yes, after hearing the testimony I want to see both.

Mr. Flehr: Are you resting?

Mr. Schapp: I rest.

RENE J. GAUBERT,

Recalled for Plaintiff in Rebuttal (previously sworn).

Mr. Flehr: Q. Mr. Gaubert, this machine of yours, Plaintiff's Exhibit 4, can you operate that machine to make bags with a gap in the longitudinal bar of the heater corresponding to the gap in Defendants' Exhibit B (Defendants' Exhibit A)?

A. Yes.

Q. Would you show the Court how you could do that?

A. I can take this strip so I will have a strip that will have a gap of considerable length.

Mr. Flehr: Let the record show that he removed longitudinal bar from Plaintiff's Exhibit 4 and is now inserting a shorter bar [265] which is how long, Mr. Gaubert?

A. This bar is somewhat three inches shorter than the other one.

Mr. Flehr: I believe the gap is in the neighborhood of three inches. A. 2-7/8 inches.

Q. Between the forward end of the longitudinal bar and the transverse bar? A. Yes.

Mr. Schapp: If your Honor please, while this is heating up, I may be allowed to call your Honor's attention to one feature wherein this machine apparently differs from the machine shown in the patent. In the patented machine did you have these removable bars?

The Witness: No, sir.

(Testimony of Rene Gaubert.)

Mr. Schapp: In the patented machine could you have performed this operation that you just performed?

A. I would simply cut and slot that another way.

Q. Yes, but could you have done it by merely——

A. That was a little improvement. It has been a later improvement.

Q. This represents a later improvement over the machine that was actually shown in the patent?

A. Yes.

The Court: Both sides are in that position, I suppose. If your client had made an improvement yesterday I take it we would have it here, too.

The Witness: I believe the heater is just about warm enough.

Mr. Flehr: Q. Just describe what you are doing, Mr. Gaubert.

A. I am putting a sheet of material in the machine which will form a tube.

Q. A tube how long?

A. This is about six inches long. Then I am putting in another sheet and I am now forming both tube and bag in one cycle. The only thing is the heat is lacking; therefore it doesn't hold together. I believe that in a few [266] seconds it will be sufficient. There is a bag which is made in a tube, there, and then in a bag with a gap in the heater.

Q. When you do that, Mr. Gaubert, you are cycling the machine, the two body portions——

(Testimony of Rene Gaubert.)

A. That is correct.

Q. Even though you have cycled the two body portions you form a longitudinal seam and you form a bottom seam in one operation?

A. That is correct.

Q. Although they happen to be on different portions?

A. That is correct.

Q. Would you remove that short bar now and put your long bar back in, Mr. Gaubert? I will ask you this question: Suppose that longitudinal bar had been a full length bar such as you just took out of the machine, could you then do the same thing on the two sheet portions?

A. Yes.

Q. In that event what you would be doing is resealing the original seal each time it comes down?

A. Yes.

Q. Is that what you do in your Exhibit 6?

A. That is so.

Q. Could you show the Court that you have a continuous heater in Exhibit 6?

A. The heater, the long longitudinal seal of the heater, this bar in this case is carried all the way for a cross seal (indicating).

Q. Now, Mr. Gaubert, could you take a heater with the longitudinal bar of full length and use it upon this Schultz Defendants' Exhibit B (Defendants' Exhibit A).

A. I could.

Q. How would you do it?

A. Providing I had a very slight alteration

(Testimony of Rene Gaubert.)

made to the means of folding over by simply cutting them in two and making them in this manner.

Q. You mean, as I understand what you would do, it would be to use the type of fold line retaining bar which you have in Plaintiff's Exhibit 4 and utilizing such a fold line retaining piece [267] in place of this bar of the Schultz machine which overlies the forward end of the mandrel——

A. That's right.

Q. (Continuing) —which then would leave a free place for the heater to come down?

A. Yes.

Q. In other words, as I understand it, to make that clear, if you substituted the fold line retaining means of Plaintiff's Exhibit No. 4 for the fold line retaining means of the Schultz device, Defendants' Exhibit B (Defendants' Exhibit A), then you could likewise substitute your heater for the so-called slotted heater of the Defendants' Exhibit B (Defendants Exhibit A)?

A. That is correct.

Mr. Flehr: You can take your seat again, Mr. Gaubert.

Your Honor, I have found this witness has been able to produce two originals of the copies of the letters which we previously endeavored to introduce. At that time we simply had facsimiles. Will you, Mr. Schapp, simply stipulate we can substitute these, or introduce them in evidence, rather in lieu of the letters introduced heretofore?

Mr. Schapp: Photostats?

(Testimony of Rene Gaubert.)

Mr. Flehr: Yes. I will ask, then, that these two letters, one dated March 28, 1936, on the letterhead of Mother's Cake & Cookie Company, and the other dated September 21, 1935, on the letterhead of Grandma Cookie Company, be substituted for the corresponding facsimiles in Plaintiff's Exhibit for identification 9, and that these can be offered in evidence.

The Court: Admitted and marked.

(The letters were marked "Plaintiff's Exhibit 9" in evidence.)

Mr. Flehr: Q. Now, Mr. Gaubert, when you first testified in this case you testified concerning the letter that I am handing to you dated March 2, 1936, on the letterhead of Los Angeles [268] Pretzel Company. A. Yes, I did.

Q. I believe you testified that that was a reproduction or photostat of the original? A. Yes.

Q. Have you made a diligent search for the original of that? A. I have.

Q. Have you been able to produce it?

A. No, we haven't been able to find it. I would consider that lost for the present time.

Mr. Flehr: Your Honor, I now offer in evidence——

The Court: Admitted and marked.

Mr. Flehr: (Continuing) —facsimile copy of the letter dated March 2, 1936 on the letterhead of Los Angeles Pretzel Company. Let's give it the

(Testimony of Rene Gaubert.)

same exhibit number and attach it to the two original letters just identified.

(The letter was marked part of Plaintiff's Exhibit 9 in evidence.)

Mr. Flehr: Q. Mr. Gaubert, now I believe you testified that on your Exhibit 6, Plaintiff's Exhibit 6, you used a continuous heater? A. Yes.

Q. Then do I understand from your testimony that that means when you are making bags of a smaller size you will be re-sealing say twice certain parts of the longitudinal seam.

A. That's right?

Q. Is that a bad thing?

A. No, it is not. It is in a way a good thing. Doing the thing twice is no detriment. It makes it probably more sure, certain.

The Court: Does speed enter into it?

A. No, your Honor.

Mr. Flehr: Q. So far as you are concerned it is not a bad thing?

A. No, it is no detriment.

Mr. Flehr: That is all. [269]

Cross Examination

Mr. Schapp: Q. If you do the sealing as you just demonstrated to the Court in two operations on one bag, don't you really get away from the original idea of your patent as expressed in your patent? A. I do not.

Q. Wasn't this really the idea of your patent,

(Testimony of Rene Gaubert.)

you provided a machine that would form a bag in a single operation?

Mr. Flehr: He is asking for a conclusion of law. This man has never qualified as a patent expert. I don't think it is fair to ask him what comes within the scope of the patent.

Mr. Schapp: I am not doing that. I am asking him what his main idea was when he filed his application.

The Court: He can answer if he wishes.

Mr. Flehr: Is the question clear?

The Witness: No.

Mr. Schapp: Will you read the question, please?
(Question read.)

The Witness: A. Yes.

Mr. Schapp: Your Honor, I would like to read into the record a portion of the main objects of the invention.

The Court: You did not hear that answer.

Mr. Schapp: He said yes.

The Court: In one operation.

Mr. Schapp: In one operation, yes.

The Court: He said "Yes."

Mr. Schapp: May I read a part of the patent into the record?

The Court: All right.

Mr. Schapp: I would like to read into the record a part from the patent relating to the general objects of the invention which is usually found in all patents, and which represents what [270] the

(Testimony of Rene Gaubert.)

inventor had in mind when he filed his patent application. It says on page 1, column 1, line 34 and following, among the objects he states:

“and to enable sealing over all of the required areas in a single operation, in cyclic sequence” and so forth.

That is all, Mr. Gaubert.

ARCHIE L. HYDE,

called by Plaintiff in Rebuttal; sworn.

Mr. Flehr: Q. What is your occupation, Mr. Hyde? A. Chemist.

Q. With what firm are you associated?

A. Smith Emery & Company.

Q. What type of firm is that?

A. It is a chemical and engineering testing firm.

Q. Did you make a test on certain pieces of moisture-proof cellophane which I gave to you a short time ago? A. Yes, sir.

Q. Would you tell the Court what that test was and the result of the test?

A. The test was a test to determine the rate of passage of moisture through different samples of cellophane. In order to do that I took a small dish and some water, put some water in the bottom of it, put the cellophane over it, and sealed it around the edge. That would leave the saturated atmosphere inside of this dish. Then I put the whole dish

(Testimony of Archie L. Hyde.)

into a desiccator in which the air was dry. That would leave the inside of the cellophane in a dry atmosphere. Then I weighed the little dish and kept it in that condition for a certain length of time, and weighed it again. The loss of weight is the moisture that has come out through the cellophane. I calculated the moisture into grams per hundred square inches. In twenty-four hours that is the amount of moisture that would come through that sheet. [271]

Q. Now, tell us, what were the different samples you tested and what was the object of your test?

A. The object was to determine whether a very short heating of the cellophane would change the moisture resistance, or the resistance to passage of moisture. I took some samples of the original cellophane to determine the quantity of moisture passing through. I took an electric iron and used it on a single sheet, put it on just for an instant, and tested that sheet afterward, and I determined the relative quantity of moisture that passed through those sheets.

Q. What was the result of that test in terms of relative moisture-proofness?

A. Well, the material, after the electric iron had been put on, it allowed moisture to pass through about three times as fast as the original.

The Court: Tell me, so I can follow this, I know very little about chemistry, and this is a crude way

(Testimony of Archie L. Hyde.)

of expressing it, but would you consider that a sweating process? A. No, hardly.

Q. Well, if you had a quarter inch of steel——

A. Sweating process, as I understand it, generally allows drops to form.

Q. You could take a piece of steel, and keeping in mind the different conditions in relation to heat and air you could sweat through a piece of steel?

A. Well, yes, in that case you could.

Q. I was wondering how far that form of a process could be applied to something.

A. I think it would apply to any material.

The Court: That is what I thought, without knowing.

Mr. Flehr: Q. Now, referring to Plaintiff's Exhibit 8, did you test a sheet of material where two portions had been overlapped together and sealed similar to the seal formed in [272] this Plaintiff's Exhibit 8, to determine whether or not a seal of that sort would affect the moisture-proofness in any way? A. I did.

Q. What were the results of those tests?

A. There was practically no difference between the material that had this seal on and the plain material.

Q. Then I understand from those tests that if the iron is not applied to the overlapped area but that iron would be applied both to the overlapped area and to a single layer of the cellophane near the overlapped area then that single layer of mate-

(Testimony of Archie L. Hyde.)

rial would have its moisture-proofness greatly impaired? A. Yes.

The Court: Because there were two thicknesses?

The Witness: No.

Mr. Flehr: No, your Honor, because the moisture-proofness for the double thickness is not affected, but if the iron is permitted to be applied to a single layer then the moisture-proofness is affected.

The Court: Yes, but the answer to my question, one covering a double area and one a single.

The Witness: Yes.

Mr. Flehr: That is all.

Mr. Schapp: That is all with this witness. Could I ask one more question of Mr. Gaubert?

The Court: Yes.

RENE J. GAUBERT,

Recalled in Rebuttal for Further Cross-Examination.

Mr. Schapp: Q. Mr. Gaubert, in your original machine, and I don't know whether it applies to the improved machine, but in the patented machine when you made a bag and after you had [273] finished it and sealed it didn't it leave a slight impairment? A. Yes, it did.

Q. Will you please describe to his Honor what the impairment was with reference to this bag?

A. It was a very, very slight amount of im-

(Testimony of Rene Gaubert.)

pairment, you might call it, in the very corners, because after the material was folded over the mandrel, the thickness of the mandrel, as much as I tried to make it as thin as possible, always was substantial enough to create, you might call it, an infinitesimal small channel on the corner of the bag. I had also little difference in the center of the bag, coming through here, which is about the same extent.

The Court: On account of the seam?

A. That's right.

Mr. Schapp: Q. Is that impairment avoided in the defendants' machine?

A. To some extent it is.

Q. For what reason is it avoided?

A. Well, it is avoided in respect to the center of it and the longitudinal seal is probably sealed a little better in here.

Mr. Schapp: Your Honor please, you can see a little better—I want to bring out——

The Court: Well, I have seen both.

Mr. Schapp: In this machine a perfect seal is made longitudinally whereas due to the single operation in the Plaintiff's machine a portion of the longitudinal seam is not sealed during the operation.

The Court: Yes, but I might call to your attention that keeping in mind this bag and the purpose of the bag, it is infinitesimal.

Mr. Schapp: Well, it wouldn't be air-tight.

(Testimony of Rene Gaubert.)

The Court: Well, I am just——

Mr. Schapp: Yes. That is all, Mr. Gaubert. [274]

Mr. Flehr: Your Honor, I would like to ask whether or not Mr. Schapp intends to put this mandrel which they produced this morning, Defendants' Exhibit F, in and operate it upon Defendants' Exhibit B (Defendants' Exhibit A). If not I will have to put that in, or have this witness answer just a few questions.

The Court: Well, you can ask him that.

Mr. Schapp: Well, is that all right?

Mr. Schultz: If we can use his roll of cellophane.

The Court: We will give you his roll of cellophane.

(The testimony was closed and a demonstration made upon the respective machines and it was thereupon ordered that the case should be briefed with the defendant filing opening and closing briefs and the time of the briefs to be 10, 10 and 10.)

[275]

[Endorsed]: No. 9871. United States Circuit Court of Appeals for the Ninth Circuit. Simplex Wrapping Machine Co., a corporation, Appellant, vs. Charles F. Schultz, Ira E. Schultz, Schultz Food Company, a Partnership, and George Koster, doing business under the fictitious name and style of Kos-

te Candy Company, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 21, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 9871

SIMPLEX WRAPPING MACHINE CO.,
Appellant

vs.

CHARLES F. SCHULTZ, an individual, IRA
E. SCHULTZ, an individual, SCHULTZ
FOOD COMPANY, a partnership, and
GEORGE KOSTER, doing business under the
fictitious name and style of KOSTER CANDY
COMPANY,

Appellees.

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL AND STATEMENT OF THE
POINTS UPON WHICH APPELLANT
RELIES ON THE APPEAL. [276]

The Appellant hereby adopts in this Court as its
Designation of Contents of Record on Appeal and

as its Statement of the Points upon which Appellant Relies on the Appeal, the Designation of Contents of Record on Appeal and the Statement of the Points upon which Appellant Relies on the Appeal, and Designation of Additional Contents of Record on Appeal, which were filed in the United States District Court, Southern Division, and which are a part of the record on appeal to this Honorable Court.

PAUL D. FLEHR

Attorney for Appellant

Aug. 1, 1941.

Receipt of a copy of the above admitted this 1st day of August, 1941.

A. SCHAPP

Attorney for Appellees

[Endorsed]: Filed Aug. 2, 1941. Paul P. O'Brien, Clerk. [277]